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In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho,
and TOM D. McELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

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On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho, appeal from the final judgment of United States Court of Appeals for the Fifth Circuit entered on the 10th day of August 1978, affirming a decision of the United States District Court for the Northern District of Texas, Dallas Division, and holding that: (1) the Texas long arm statute authorized assertion of personal jurisdiction by the district court over the non-resident defendant Idaho officials; (2) the Securities Exchange Act of 1934 provided an independent basis for personal

jurisdiction over said officials; (3) venue was proper in the Northern District of Texas; (4) the Idaho Corporate Takeover Law was preempted by the Securities Exchange Act of 1934 as amended by the Williams Act; and (5) the said Idaho law was also invalid under the commerce clause as an unconstitutional burden on interstate commerce.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which appears in the Appendix hereto, pp. A-1 to A-84, *infra,* is reported at 577 F.2d 1256 (5th Cir. 1978).

The Memorandum Decision of the United States District Court for the Northern District of Texas, Dallas Division, which appears in the Appendix hereto, pp. A-85 to A-125, *infra,* is reported at 439 F.Supp. 420 (N.D. Tex. 1977).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Northern District of Texas, Dallas Division, was entered on the 10th day of August 1978.

Notices of appeal to this Court were duly filed in the United States Court of Appeals for the Fifth Circuit on the 23d day of October, 1978, (Appendix hereto, pp. A-126 to A-127) and in the United States District Court for the Northern District of Texas, Dallas Division, on the 24th day of October, 1978 (Appendix hereto, pp. A-128 to A-129).

This appeal is being docketed in this Court within ninety (90) days from rendering of the final decision below. The

jurisdiction of this Court is being invoked under 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas.

2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be "in" or "conducting" business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state.

3. Whether the doctrine of *Ex parte Young,* which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas.

4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a "violation" of said Act for purposes of federal court jurisdiction thereunder when no specific proscription of thereof has been breached.

5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho

statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdiction portion of the Exchange Act a "violation" occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho of an Idaho official in enforcing the Idaho law.

6. Whether Congress has reserved to the States, under Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), the power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

7. Whether, independently of Section 28(a), the States have the inherent power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

8. Whether a federal court may weigh the benefits of a state corporate takeover law against its alleged effect upon interstate commerce.

9. Whether, independently of Section 28(a), state corporate takeover laws constitute an undue burden on interstate commerce.

10. Whether a tender offeror has standing to maintain an action under the Williams Act amendments to the Securities Exchange Act of 1934 to challenge the constitutionality of state corporate takeover laws.

CONSTITUTIONAL PROVISIONS AND RULES

Article 1, Section 8, Clause 3, United States Constitution:

> The Congress shall have Power . . .
>
> To regulate Commerce . . ., among the several States, . . . ;

Article 6, Clause 2, United States Constitution:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . ., shall be the surpreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

Eleventh Amendment, United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign state.

Securities Exchange Act of 1934, §§ 13(d, e), 14(d-f), 15 U.S.C. §§ 78m(d, e), 78n(d-f) (1970):

> Because of length of text, reproduced at pp. A-130 to A-138 of Appendix.

Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa:

> The district courts of the United States, . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity or actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred.

Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . .

§ 28(a), 15 U.S.C. § 78bb(a):

. . . Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

§§ 30-1501 to 30-1513:

Because of length of text, reproduced at pp. A-139 to A-155 of Appendix.

Texas Revised Civil Statutes Annotated article 2031b, § 3 (Vernon):

Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance or resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock

company, association, partnership, or non-resident natural person of the Secretary of State of Texas as an agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or to be made a party.

Texas Revised Civil Statutes Annotated article 2031b, § 4 (Vernon):

For purposes of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or by the committing of any tort in whole or in part in this State.

* * *

RAISING THE FEDERAL QUESTION

In its complaint and at all stages of the proceedings below the Appellee raised the claim that the Idaho Corporate Takeover law, IDAHO CODE §§ 30-1501 to 30-1513, was repugnant to the United States Constitution, both as being preempted by the supremacy clause, Article 6, cl. 2, and as being an undue burden on interstate commerce, Article 1, § 8, cl. 3, due to the enactment and existence of the Williams Act amendments to the Securities Exchange Act of of 1934, 15 U.S.C. §§ 78m(d, e) & 78n (d-f), which claim was resisted by Appellants.

At the earliest stages of the proceedings below Appellants raised their contentions that the United States Court for the Northern District of Texas, Dallas Division, lacked jurisdiction over them, and that venue was improper in said court.

After a special hearing solely on the issues of jurisdiction and venue which was ordered by the United States Court of Appeals for the Fifth Circuit the district court entered findings of fact, conclusions of law and its order holding that personal jurisdiction and venue were proper therein, and this conclusion was reflected in the subsequent Memorandum Decision of said district court. After trial on the merits the district court further concluded that the Idaho law was preempted by the federal law and was also an undue burden on interstate commerce.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit wherein the jurisdiction and venue claims of the Idaho officials were reiterated as well as the contention that the Idaho law was not in conflict with or preempted by United States constitutional provisions. In a decision written by Wisdom, J., and joined in by Clark, J., over the vigorous dissent of Godbold, J., the circuit court affirmed the jurisdiction, venue, and constitutional conclusions of the district court.

STATEMENT OF THE CASE

Appellee Great Western United Corporation (hereinafter GWU), a Delaware corporation with executive offices in Dallas, Texas, the controlling interest in which is owned by N. B. Hunt and W. H. Hunt, is traded on the N.Y.S.E. Early in 1977 GWU proposed a partial tender

offer for two million shares of the Sunshine Mining Company, a N.Y.S.E. traded Washington corporation with its principal silver mining operation in the state of Idaho and other substantial subsidiary assets located in the States of New York and Maryland. The tender offer for shares of stock brought into play the federal law disclosure requirements of the Williams Act amendments to the Securities Exchange Act of 1934 as well as, potentially, the disclosure and review requirements of corporate takeover laws of the three states.

Simultaneously, on Monday, March 21, 1977, Great Western United Corporation representatives personally appeared at and filed a 13D disclosure statement with the United States Securities and Exchange Commission, personally appeared in Idaho and filed an information statement under the Idaho Corporation Takeover Law, and personally appeared in and approached the proper authorities of the States of New York and Maryland regarding assertion of jurisdiction under those States' corporate takeover laws. Pursuant to request by GWU representatives that they be informed in Texas by telephone and telecopy of Idaho's response to the GWU filing, on Friday, March 25, 1977, Idaho's Deputy Administrator of Securities telecopied to Texas a letter requesting more information from GWU (reproduced in Appendix hereto at pp. A-156 to A-164) and Appellant McEldowney telecopied to GWU his order delaying the effective date of the GWU tender offer (reproduced in Appendix hereto at pp. A-165 to A-166. In response, on Monday, March 28, 1977, GWU filed an action seeking injunctive relief and a declaratory judgment in the United States District Court for the Northern District of

Texas, Dallas Division, against the attorneys general and officials in charge of securities regulation of the States of Idaho, New York, and Maryland, and alleged that the corporate takeover laws of the three states were repugnant to the Constitution of the United States and that jurisdiction over the state officials and venue were proper in the Northern District of Texas.

Concurrently, GWU applied to the district court for an *ex parte* temporary restraining order against the state officials to prohibit their enforcement of the challenged state laws. After counsel for the Idaho officials called the court, the matter was continued until 9:00 a.m., Wednesday, March 30, 1977, for a hearing on GWU's motion for a restraining order. Counsel for the Idaho and Maryland officials appeared at the March 30 hearing, and a formal motion to dismiss for lack of jurisdiction and venue was presented in behalf of the Idaho officials. After hearing argument by counsel for GWU and for the Idaho and Maryland state officials, accepting exhibits, and having received a brief in behalf of the Idaho official defendants on the issues of jurisdiction and venue, the court, at approximately 2:30 p.m. of said day, entered a temporary restraining order as requested by GWU, and consolidated a hearing for preliminary injunction and trial on the merits for Friday, April 8, 1977. The court refused Idaho counsel's request for a stay of its order pending an emergency appeal to the United States Court of Appeals for the Fifth Circuit. Idaho counsel, joined by New York and Maryland counsel, immediately filed a request for emergency appeal to said Circuit Court, which was granted and oral argu-

ment thereon scheduled for Tuesday, April 5, 1977. Following a spirited argument and questioning by all members of the judicial panel, the circuit court on April 6, 1977, stayed the order of the district court pending further proceedings therein, ordered that court to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits, and suggested that because the "proceeding involves novel and difficult issues which have broad impact upon federalism" that, should the district court determine that it has jurisdiction and venue, it should consider interlocutory certification of such determination to the circuit court under 28 U.S.C. § 1292(b) (1970) before the trial on the merits. (The circuit court's order is reproduced in its entirety in the Appendix hereto at p. A-167.)

The hearing so ordered was held in Dallas on April 8, 1977, and on April 21, 1977, the court filed its written findings of fact, conclusions of law, and order, which held that no case or controversy existed between GWU and the Maryland officials, but that jurisdiction and venue were proper in the Northern District of Texas against the Idaho and New York officials against whom a case or controvesry was deemed to exist. The court declined to make an interlocutory certification of the jurisdiction and venue issues to the Fifth Circuit. Mandamus and prohibition petitions, as well as petitions for leave to appeal under 28 U.S.C. §§ 1291 and 1292(b), were presented to the United States Court of Appeals for the Fifth Circuit which, on May 16, 1977, denied the requested relief.

On May 23 and 24, 1977, the merits of the case were tried to the court and several expert witnesses were heard

from each side to the controversy. As a result of a letter from the New York Attorney General declining jurisdiction under the New York takeover law the court dismissed the action against New York's Attorney General due to mootness. In its Memorandum Decision rendered September 2, 1977, the district court considered the issue of standing as well as reiterated its jurisdiction and venue determinations and concluded regarding the merits that the Idaho Corporate Takeover Law was prohibited by the supremacy clause of the United States Constitution due to implied preemption by federal law and was so in conflict with the Constitution's commerce clause as to constitute an undue burden upon interstate commerce.

The Idaho officials filed an appeal to the United States Court of Appeals for the Fifth Circuit on September 8, 1977, and oral argument thereon was presented on December 13, 1977. On August 10, 1977, the appellate court decision affirming the district court decision below, with Judges Wisdom and Clark in the majority over the dissent of Judge Godbold, was filed.

THE QUESTIONS ARE SUBSTANTIAL

This Court's landmark 1908 decision in *Ex parte Young*, 209 U.S. 123 (1908), and all its progeny wherein state officials have been made amenable to suit by a stripping of their Eleventh Amendment cloak of sovereign immunity have occurred solely in courts sited within the states wherein such officials have held office. The *Young* fiction has never been extended beyond its limited home state jurisdictional base, nor is there any reported case prior to this instant action in which a court sited outside the official's home state has presumed to entertain jurisdiction

over a non-resident state official as a result of actions that person has taken or might take in his governmental capacity. In fact, in the only two reported cases of note on the subject the courts have found jurisdiction over non-resident state officials fatally lacking. *Turner v. Baxley*, 354 F.Supp. 963 (D. Vt. 1972); *Idaho Potato Commission v. Washington Potato Commission*, 410 F.Supp. 171 (D. Idaho 1976).

Not only are the minimum contacts articulated by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Hanson v. Denckla*, 357 U.S. 235 (1958), totally lacking by virtue of the fact that only one of the affected Idaho officials acted at all and the whole of his action took place within the State of Idaho as a result of a submission to the jurisdiction of Idaho law by Appellee Great Western United Corporation, thus creating no direct effects in the State of Texas, but also the commercial activity *by the defendant* which has given rise to out of state jurisdiction was fatally lacking with respect to the state officials acting in a governmental capacity with regard to their state's laws. Every instance wherein use of a foreign forum has been authorized by the courts has been directed at defendants who engaged in commercial, profit-oriented enterprise. See *Kulko v. Superior Court*, —— U.S. ——, 98 S.Ct. 1690, 1699 (1978). It is further impossible to conceive of a circumstance under which state officials charged with action such as is evidenced herein would be entitled to enjoy the "benefits and protections" of the laws or courts of the foreign forum as articulated in *International Shoe* or *Hanson v. Denckla*. Another problem surrounds the concept of exercising a "privilege

of conducting activities in a state" set out in *International Shoe*. The phrase implies that the forum state accedes to the conduct of certain activities within its borders and makes the person so acting amenable to suit in the forum's courts as a "price" exacted for allowing the conduct. In the context herein, it is difficult to imagine the State of Texas acceding to purposeful activities therein by state officials of another state directed as Texas residents, nor did such activity occur.

Assertion of Texas long-arm jurisdiction can only be based upon satisfaction of two levels of inquiry. First, the exercise of jurisdiction must be within some statutorily conferred authority. TEX. REV. CIV. STAT. ANN. art. 2031b, §§ 3, 4 (Vernon). Though the Texas Supreme Court has recently refused to engage in semantical nuances over what constitutes "doing business" in Texas for long arm jurisdiction purposes, the "doing business" concept must not fail to be explored carefully when attempted to be applied to state officials of a foreign state who are charged solely with the performance of governmental functions. *U-Anchor Advertising, Inc. v. Burt,* 553 S.W. 2d 760 (Tex. 1977), *cert. denied,* 98 S.Ct. 1235 (1978). Appellant state official Kidwell took no action whatsoever to enforce the relevant Idaho law, yet was sued merely because he is statutorily charged with a duty of enforcement. Appellant state official McEldowney took the following action in enforcing in Idaho an Idaho law: (*i*) reviewed in Idaho a registration statement voluntarily filed in Idaho by Appellee GWU under the Idaho corporate takeover law, (*ii*) authorized his Deputy Administrator for Securities to issue a comment letter about the registration statement by transmitting the same, at GWU's request, by telecopier from Idaho, (*iii*) issued from Idaho by telecopier an administrative order delaying the effective date of GWU's proposed tender offer. None of the actions occurred in Texas; none of the actions occurred in a commercial or business context as contemplated by the Texas long-arm statute.

Though it is improper to look at the second, due process, level of inquiry under the Texas long-arm statute if the threshold "business" activity context is unfulfilled, the due process and fundamental fairness requirements mandated by numerous decisions of this Court cannot be overlooked. See *International Shoe Co. v. Washington, supra; Hanson v. Denckla, supra; Shaffer v. Heitner,* 433 U.S. 186 (1977); *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690 (1978). A "practical" or "extra-territorial" effect of action taken by state officials in Idaho which comes to rest in Texas does not meet this Court's Fifth Amendment due process or fundamental fairness standards. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690, 1699 (1978). Under a "practical" or "extra-territorial" effect standard state officials taking action in their own states would be amenable to suit in *any* state wherein a residual effect of their action was felt despite the fact that such officials did not purposefully derive any benefit from any activities relating to such foreign states—an unwarranted result. *Id.* Such a concept, though unique, would have a devastating effect upon federalism concepts which underlie our Constitution, would cause an undue and unwarranted raid upon state treasuries to meet the extraordinary expense of defending actions in foreign jurisdictions, and would have a chilling effect upon state legislatures if all laws contem-

plated for passage must first be measured in terms of the potential effect they might have in some other state. Though the trial court and court of appeals, applying decisions relating to the Texas long-arm statute, concluded that fundamental fairness and due process standards were met in this action, neither court took into consideration the more narrow approach to long-arm jurisdiction announced in late July, 1977, by the Texas Supreme Court in *U-Anchor Advertising, Inc. v. Burt,* 553 S.W.2d 760 (1977), *cert. denied,* 98 S.Ct. 1235 (1978).

Venue, too, under the general federal venue statute, 28 U.S.C. § 1391(b) (1970), is just as lacking as is personal jurisdiction. Though the court of appeals opted for an "expansive interpretation of the venue statute," *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1273 (5th Cir. 1978), which has not been authorized by this Court, the district court properly concluded that GWU's "claim arose in Idaho, the source of the power extra-territorially asserted", *Great Western United Corp. v. Kidwell,* 439 F.Supp. 420, 433 (N.D. Tex. 1977), and that the argument that GWU was injured in Texas could be applied equally to all other federal judicial districts, *id.* Though the court of appeals would place venue in Texas, apparently under a theory of judicial economy, by theorizing on the difficulties which might be faced by GWU if New York and Maryland officials had remained in the suit, such an "efficiency" concept cannot be the excuse for beating down constitutional due process standards. *Turner v. Baxley, supra; Idaho Potato Commission v. Washington Potato Commission, supra.*

Applying the jurisdiction and venue section of the Securities Exchange Act of 1934, § 27, 15 U.S.C. § 77aa (1970), to this action requires a deliberate perversion of the concept of a "violation" of the securities laws contained therein as a jurisdictional requisite. It is well recognized that corporations are creatures of state law and that most activities of a corporation and those who guide it are governed by state, not federal, law. *Cort v. Ash,* 422 U.S. 84 (1975), *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462 (1977). In light of the fact that Congress has not seen fit to attempt to preempt the entire corporate law field by enacting a federal law of corporations, the incursions into state corporate regulation occasioned by Congress in the field of securities regulation must be deemed a limited incursion and, as recognized by section 28(a), 15 U.S.C. § 78bb(a) (1970), the Securities Exchange Act of 1934, is not designed to "affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with" the 1934 federal Act. The linchpin of the instant case is whether an alleged "conflict" with federal law will rise to the dignity of a "violation" of the 1934 Act for jurisdiction when no articulated proscription of the Act has been breached, and whether state officials engaged solely in the governmental function of enforcing state corporate takeover laws are somehow "participants in" the securities field so that they are subjected to the duties required of participators, rather than regulators of the securities field acting in concert with federal regulators. It is clear from judicial interpretations and the legislative history of the Securities Exchange Act

of 1934 that its purpose was to prevent and punish fraud in the purchase and sale of securities by aiming at stock manipulators, and was not designed to affect state officials who were themselves attempting to regulate in the securities field. See, e.g., *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195, 205 (5th Cir. 1960). The problem with the syllogism advanced by GWU and entertained by the district and circuit courts in concluding that a "conflict" between state and federal law or an implied preemption of state law constitutes a "violation" of the Securities Exchange Act of 1934 for jurisdictional purposes is that no portion of the Act places any affirmative duty on states or state officials which *can* be "violated." Even if a "conflict" or implied preemption existed for Section 28(a) purposes that section in no terms makes such effect illegal or a "violation" of the Act. All Section 28(a) provides is that state law which does not conflict is permitted, thus indicating that conflicting state law would be a nullity or unenforceable. Section 28 prohibits no conduct, nor does it prescribe acceptable conduct, and no case decided under section 28 prior to this instant action has ever attempted to equate a "violation" of the Securities Exchange Act of 1934 with enactment or enforcement of a state statute.

Personal jurisdiction under Section 27 of the 1934 Act is just as lacking as it is under the Texas long-arm statute under the same constitutional due process and fundamental fairness tests which must be applied. It is incomprehensible how use of an interstate medium, the telephone, at the request of the Appellee (rather than requiring GWU to come back to Idaho to receive the administrative decision) might provide the necessary constitutional standard

whereby the Idaho officials would be subjected to the jurisdiction of a foreign court. If this be so, then jurisdiction should have been denied merely because GWU, by itself requesting the use of the interstate medium, wrongfully induced the one Idaho official who took action to participate in an action which could subject him to foreign jurisdiction. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690 (1978).

Venue under Section 27 is similarly lacking. The novel approach of the court of appeals again equates the more restrictive concept of venue with the concept of personal jurisdiction and concludes that an extraterritorial effect accomplished by use of an interstate medium is sufficient to satisfy the Section 27 venue provision that suit thereunder may be brought in any district wherein a defendant "transacts business." This approach is supported by no other reported case and, as before, tortures the basic federalism principles which provide the foundation for our constitutional system of federal-state relations by deeming state officials somehow to be "transacting business" in a commercial sense when they take action in a governmental capacity in their own states to enforce their states' laws. This Court has recently failed to recognize the "effect" test and has re-emphasized the need for commercial activity as the basis for extraterritorial suits. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690 (1978). The cases cited by the circuit court to support this proposition nowhere meet or address this specific venue question, *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1272 (5th Cir. 1978), and the single case cited by the district court to support this contention, *British-American Ins. Co. v.*

Lee, 403 F.Supp. 31 (D. Del. 1975), is not only wholly inapposite but also reaches the conclusion that venue is improper.

The federal-state or central-local dichotomy inherent in our polity is fundamental to the conduct of American government. Pound, *Law and Federal Government,* in FEDERALISM AS A DEMOCRATIC PROCESS 3, 12-13, 16-17 (1942); Wechsler, *The Political Safeguards of Federalism,* in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49, 49-50, 52 (1961). The interplay between the various omni-competent states and the national Union wherein the areas of state competency are subject to expansion and contraction by the national government's assertion of certain well defined, though often narrow, constitutional powers remains viable and precious so as to provide a continuous pattern of living and thinking ingrained in the general conduct of our Nation. As Madison early commented, constitutional powers delegated to the federal government are few and well defined, while those which remain to the states are numerous and indefinite. A. HAMILTON, J. MADISON, J. JAY, THE FEDERALIST PAPERS, No. 39, at 292 (New American Lib. ed. 1961). It would be contrary to the manner in which Congress has acted in affecting areas of omni-competence of the states, and a dangerous precedent, to presume that an Act of Congress, neutral on its face, has an intended effect in derogation of rights of states as expressed through state officials. Wechsler, *The Political Safeguards of Federalism,* in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49, 78-79 (1961); *Oregon v. Mitchell,* 400 U.S. 112 (1970); *National League of Cities v. Usery,* 426 U.S. 833 (1976). Yet, both the district court and court of appeals have apparently found no difficulty in sweeping away the

foundations of federal-state relations to reach unprecedented conclusions that federal courts will allow state long-arm statutes to reach to out of state officials performing, solely in their own states, governmental functions, and to apply against state officials jurisdictional and substantive conclusions under federal securities law never before reached by any other courts and far beyond the plain language of the involved federal statutes. The frightening effect that such a cavalier approach to federalism principles demonstrates is heightened when one considers the direct financial consequences broad application of *Ex parte Young* principles to reach such jurisdictional and venue conclusions will inevitably have upon state public purses when state officials are required to repair to foreign jurisdictions to defend the constitutionality of their home states' laws. To allow such a principle to become ingrained in federal jurisprudence cannot help but have the further effect of chilling the state legislative process if any potential state law must be measured in terms of what possible extraterritorial effect it may remotely have.

Changes in corporate ownership are accomplished in several ways, including sale of assets, merger, consolidation, and the like. In most types of proposed corporate change time for cautious deliberation and investigation of proposals is inherent in the process involved. Tender offers for controlling shares in the stock of a "target company" by a "raiding company" have, on the contrary, been typified by such speedy action that there is no time for deliberation and caution—and that speed is precisely what raiding companies seek to preserve. The frenetic hostile, short

duration tender offer action upon the market place for shares of corporate stock designed to produce an immediate, knee jerk response has properly been dubbed the "Saturday night special." When it became clear that some regulation was needed in the tender offer field Congress passed, effective July 28, 1968, the Williams Act amendments to the Securities Exchange Act of 1934, sections 13(d, e), 14(d-f), 15 U.S.C. §§ 78m(d, e), 78n(d-f), which merely contain reporting requirements upon companies seeking to accomplish tender offers which would result in their ownership of more than five percent of the target company's outstanding shares of stock. During the course of congressional action on the proposed amendments Congress became aware of the fact that the State of Virginia had proposed and, in fact, enacted a state corporate takeover law, effective March 5, 1968, intended to regulate the identical activity Congress sought to regulate, yet Congress chose not to include words of express preemption in the federal law. The federal law does not prevent the Saturday night special; state corporate takeover laws, of which there are presently thirty-two, do prevent this hasty, unconsidered hostile action. The Williams Act amendments have no provision for delay or for review of the information required to be reported hereunder.

The Court has recognized that "Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 137 (1973). See also Securities Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a); *SEC v. National Securities, Inc.* 393 U.S. 453, 461 (1969). Given the recognized right of states

to regulate concurrently in the securities area, a state law should be deemed to conflict with federal law for Section 28(a) purposes only when the state law makes it impossible to comply with applicable federal law. See e.g., *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969); *Crosby v. Wiel,* 382 Ill. 538, 48 N.E.2d 386 (1943); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case W. Res. L. Rev. 722, 740-41 (1970); Comment, *Take-Over Bids in Virginia,* 26 Wash. & Lee L. Rev. 323, 333-34 (1970). See also *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963). At no time in the hearings before the district or circuit courts was evidence presented which indicated or implied that such a conflict creating impossibility of performance exists, and, in fact, the evidence was precisely to the contrary. For the courts to inquire merely whether Idaho law, Idaho Code §§ 30-1501 to 30-1513, might frustrate the purposes and objectives of the federal law introduces a new element of judicial scrutiny into the securities regulation field not warranted by the Securities Exchange Act of 1934 or the decisions thereunder.

Even if the right of Idaho to act in the corporate takeover field had not been preserved by Section 28(a) Idaho law does not act to frustrate accomplishment of the full purposes and objectives of Congress within the meaning of this Court's decision in *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). While there may be a difference as to purpose, such does not create a Section 28(a) "conflict." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963). The purpose of the Williams Act amendments was set forth by their sponsor as closing "a sig-

nificant gap in investor protection under the Federal Securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 CONG. REC. 854 (Jan. 18, 1967) (remarks of Sen. Williams). Other sources underscore the fact that the Williams Act is solely a disclosure scheme enacted for the benefit of holders of equity securities in a target company and is not designed to displace state law. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); 113 CONG. REC. 24664 (Aug. 30, 1967) (remarks of Sen. Williams); *id.* at 857-58 (Jan. 18, 1967) (remarks of Sen. Kuchel). State takeover laws utilize the disclosure policy of the Williams Act as a starting point to supplement and complement the minimal requirements of federal law with a state law overlay which insures investor information and provides a delay factor to secure such information vital to investors in determining whether to accept a tender offer and to prevent the Saturday night special raid on a target company under which an investor has no chance, due to lack of time and limited information, to determine whether he is better off keeping or selling his equity shares. The reasoning of the courts below, however, improperly rejects the ability of states to enact different, non-conflicting statutes in the takeover area notwithstanding Congress' express authorization of such statutes under Section 28(a). The fact that the Williams Act is a disclosure statute and that the Idaho statutes may contemplate more disclosure than the Williams Act does not support the conclusion of a preemptive conflict between the federal and state laws. U.S. CONST. art. 1,

§ 8, cl. 3 & art. 6, cl. 2. While the state law may occasion delay in the tender offer, the beneficiaries of any delay are the shareholders of the target company. This fact is amply supported by the record below by testimony of witnesses for both Appellants and Appellee. The Idaho law attempts to bring into the takeover process meaningful substitutes for the usual negotiation and deliberation process that is inherent in an acquisition, merger, consolidation, sale of assets, or other change in corporate control. Though the Idaho law may slow down the takeover process and increase the likelihood that another, higher offer for the shares of stock will be obtained, such action inures to the benefit of shareholders of the target company whose elected representatives, the directors and officers of the target company, are placed in a position where they may exercise their duty to the shareholders by negotiating the best result from either the initial offeror or another suitor. Contrary to assertions by Great Western United Corp., congressional enactment of the Williams Act legislation to regulate tender offers by requiring disclosure does not create a federally authorized unfettered right to effect a takeover without regard to shareholder protections that the states have traditionally established. Though the Act of Congress occupies some field, we must know the boundaries of that field before it can be concluded that Congress has precluded a state from the exercise of powers reserved to it by the Constitution. U.S. CONST. art. 6, cl. 2; *De Canas v. Bica*, 424 U.S. 351, 360 n. 8 (1976); *quoting Hines v. Davidowitz*, 312 U.S. 52, 78 (1941) (Stone, J., dissenting). This Court's recent decision in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), makes it clear that protection of investors, not

guarantees to takeover offerors, is the crux of the Williams Act amendments to the Securities Exchange Act of 1934.

Since the Williams Act acted in a field traditionally shared by the states (and occupied at the time of its enactment by state law in the State of Virginia) the courts below should have begun with the assumption that historic state police powers were constitutionally exercised. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); Securities Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a). The arguments and conclusions of the courts below are appropriate only under circumstances where Congress has not expressly or impliedly authorized state legislation. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945); Bikle, *The Silence of Congress*, 41 HARV. L. REV. 200, 220-21 (1927). With regard to concurrent state-federal regulation of securities markets and brokers see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973). See also *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R. Co.*, 393 U.S. 129 (1969). The possibility of inconvenience in the exercise of state powers will not alienate and extinguish a preexisting right of state sovereignty, only an immediate constitutional impossibility can accomplish that end. U.S. CONST. art. 1, § 8, cl. 3; *Goldstein v. California*, 412 U.S. 546, 554-55 (1973). See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), where this Court has balanced competing state and federal interests.

Regardless of the express authorization of section 28(a), states have an inherent right to enact takeover laws and a legitimate interest in their operation. Such statutes must carry a presumption of validity. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190-91 (1938), and *Brotherhood of Locomotive Firemen, etc., supra*. The Idaho law protects corporate shareholders by affording the Director of the Department of Finance, in his securities regulation capacity, the opportunity to review takeover filings for content and adequacy of disclosure, by allowing the board of directors of a target company to exercise fiduciary duties, and by giving shareholders more time and information so as to have the opportunity to make informed investment decisions not available under a Saturday night special context, and results in restoration of the rationality of negotiation to tender offer transactions. Idaho does have a legitimate interest in investor protection. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917). Because infirmities of the marketplace have caused many corporations' shares to be undervalued (as is amply supported by evidence adduced in this action), often sufficiently so as to make them vulnerable to takeover offers at bargain prices, investors are potentially subjected to a raid on a valuable asset without the immediate ability to acquire knowledge of the relative advantages or disadvantages of accepting the tender offer for their shares. A takeover is not simply an aggregate of numerous transactions in the securities of a target company. Instead, it is a surprise, hasty mass securities exchange and a corporate restructuring which

can be accomplished under other methods only by means of negotiation and deliberation wherein the interests of shareholders are safeguarded by state law and normal market processes. State law operating to regulate this process in concert with federal disclosure regulations does not create an undue burden on interstate commerce. In this instant case it can readily be seen from Deputy Administrator Baptie's letter to GWU (Appendix pp. A-156 to A-164 that Idaho did not ask onerous questions of GWU, yet the corporation declined to respond (after already voluntarily submitting to jurisdiction under the Idaho takeover law) and, instead, filed this action. The Idaho request was not incompatible with the federal law.

A further threshold issue is that of the standing of a raiding offeror under the Williams Act to bring an action under its aegis to challenge state takeover laws. Though this Court in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), amply and at length reviewed the legislative history of the Act, the question of the Act being a grant of standing to a tender offeror in the context herein presented was not addressed in that limited holding. *Id.* at 42 n. 28. The issue is squarely raised in this action.

The fundamental jurisdictional issues involving personal jurisdiction over non-resident state officials under long-arm statutes or under the jurisdictional section of the Securities Exchange Act of 1934, the question of subject matter jurisdiction under the Securities Act, and applicability of general and Securities Act venue statutes to situations where action taken in one state has a consequential effect in the state in which venue is sought have never before been addressed by this Court.

Likewise, the questions of whether state corporate takeover laws may stand under the supremacy or commerce clauses of the United States Constitution, though often discussed and written about, and the subject of National Moot Court competition in 1976, have never reached a decisional stage by a federal trial or appellate court prior to this instant action and have not been addressed by this Court.

All these fundamental questions will recur and place a cloud over the tender offer field and action taken by state officials unless resolved by this Court. The fact of uncertainty of the right of state corporate takeover laws to exist in concert with the Williams Act is amply demonstrated by the ambivalence and indecision of the Securities Exchange Commission itself. Though the Commission participated in this instant case at the court of appeals level to argue the unconstitutionality of the state laws, it has recently in Ohio, after the circuit court decision in this case had been announced, taken a contrary position by indicating its deference to the Ohio takeover law in a takeover bid by Occidental Petroleum Corp. See Appendix hereto at pp. A-168 to A-169.

Though recognizing that resolution of the threshold standing, subject matter jurisdiction, personal jurisdiction, and venue issues *could* cause this Court to avoid or fail to reach the merits of the substantive tender offer questions, Appellants would merely point out to the Court that precedent as impressive as *Marbury v. Madison*, 1 Cranch. (5 U.S.) 138 (1803), has not earlier dissuaded this Court from addressing the merits of cases with jurisdictional defects.

Appellants would also point out to the Court the dovetailing effect that the jurisdictional issues herein regarding state officials would have with the state sovereignty issues presently before the Court by writ of certiorari in *University of Nevada, and the State of Nevada v. John Michael Hall, et al.*, No. 77-1337, October Term 1977 (U.S.S.Ct. *certiorari granted*, May 30, 1978).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

PETER E. HEISER, JR.
SPECIAL DEPUTY ATTORNEY GENERAL OF IDAHO
Counsel for Appellants.

November 5, 1978.

(Appendix Follows)

APPENDIX

No. 77-2809.
United States Court of Appeals,
Fifth Circuit.

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho,
Defendant,
Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,
Defendant-Appellant.

Aug. 10, 1978.

Appeal from the United States District Court
for the Northern District of Texas.

Before: WISDOM, GODBOLD and CLARK,
Circuit Judges.

WISDOM, Circuit Judge:

This appeal involves important issues relating to a state statute regulating corporate takeovers through tender offers. The plaintiff-appellee is Great Western United Corporation (Great Western), a publicly owned Delaware corporation with its major executive offices located in Dallas, Texas. The principal officers, all directors, and the con-

trolling shareholders of Great Western reside in Dallas. The defendant-appellant is Tom D. McEldowney, Director of the Idaho Department of Finance, charged with responsibility for enforcing the Idaho Takeover Statute, Idaho Code §§ 30-1501-13 (Cum.Supp.1977).[1]

Idaho, as well as thirty-one other states, regulates corporate takeovers through a tender offer.[2] This case pre-

[1]Wayne L. Kidwell, the Attorney General of Idaho, was also a defendant before the district court. He has chosen not to appeal to this Court.

[2]The thirty-one other statutes are Alaska Stat. §§ 45.57.010-.120 (Cum.Supp.1976) (eff. June 8, 1976); Ark.H.B. No. 546 (eff. Mar. 24, 1977); Colo.Rev.Stat. §§ 11-51.5-101 to 108 (Cum.Supp.1976) (eff. July 1, 1975); Conn.Gen.Stat.Ann. §§ 36-347a to 347m (West Supp.1976) (eff. June 1, 1976); Del.Code Ann. tit. 8, § 203 (Cum. Supp.1976) (eff. May 1, 1976); Fla.Laws ch. 77-441 (1977) (eff. Oct. 1, 1977); Ga.H.B.No. 320 (eff. Mar. 1, 1977); Haw.Rev.Stat. §§ 417E-1 to -15 (Supp.1975) (eff. May 24, 1975); Ind.Code Ann. §§ 23-2-3-1 to 12 (Burns Supp.1976) (eff. May 1, 1975); Kan.Stat. Ann. §§ 17-1276 to 1285 (1974) (eff. July 1, 1974); Ky.Rev.Stat.Ann. §§ 292.560-.630 (Baldwin Cum. Issue 1976) (eff. July 1, 1976); La. Rev.Stat.Ann. §§ 51:1500-:1512 (Cum.Supp.1977) (eff. June 28, 1976); Md.Corp. & Ass'ns Code Ann. §§ 11-901 to 908 (Cum.Supp. 1976) (eff. July 1, 1976); Mass.Laws Ann. ch. 110C, §§ 1-13 (Lawyer's Co-Op. Supp.1977) (eff. May 22, 1976); Mich.Stat.Ann. §§ 21.293(1)-(17) [M.C.L.A. §§ 451.901-451.917] (Cum.Supp.1977) (eff. July 1, 1976); Minn.Stat.Ann. §§ 80B.01 to .13 (West Cum. Supp.1977) (eff. Aug. 1, 1973); Miss.Code Ann. §§ 75-72-1 to 72-23 (Cum.Supp.1977) (eff. July 1, 1977); Neb.L.B. No. 303 (1977); Nev.Rev.Stat. §§ 78.-3776-.3778 (1973) (eff. Mar. 4, 1969); N.H.Rev. Stat. 421-A-1 to A-15 (1977); N.J.S.B. No. 808 (1977) (eff. April 27, 1977); N.Y.Bus.Corp.Law §§ 1601-1613 (McKinney Supp.1976) (eff. Nov. 1, 1976); N.C.L. ch. 781 (1977) (eff. June 28, 1977); Ohio Rev.Code Ann. § 1707.041 (Page Supp.1976) (eff. Oct. 9, 1969); Pa.Stat.Ann. tit. 70, §§ 71-85 (Purdon Supp.1977) (eff. Mar. 3, 1976); S.D.Compiled Laws Ann. §§ 47-32-1 to 47 (Supp.1977) (eff. July 1, 1975); Tenn.Code Ann. §§ 48-2101 to 2114 (Cum.Supp. 1976) (eff. Mar. 17, 1976); Tex.Reg. §§ 065.15.00.100-1700 (1977); Utah Code Ann. §§ 61-4-1 to 13 (Supp.1977) (eff. Feb. 5, 1976); Va.Code Ann. §§ 13.1-528 to 541 (Cum.Supp.1977) (eff. Mar. 5, 1968); Wis.Stat.Ann. §§ 552.01-.25 (West Spec.Pamph. 1977) (eff. July 1, 1972).

An orthodox tender offer is a publicly made invitation, usually announced in a newspaper advertisement, to all shareholders of a corporation, to tender their shares for sale at a specified price. To induce the shareholders to sell, the price usually includes a premium over the current market price of the target company's shares. Cash or other securities may be offered to the shareholders as consideration. An offer is made for a limited period of time only. An offeror may offer to buy all tendered shares, or it may offer to buy only a stated number. In general, the offeror also sets a minimum number of shares that must be tendered before he will buy any shares. The Williams Act regulates transactions other than orthodox tender offers. *See, e. g.*, Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 1-34 (1977). Indeed, neither Congress nor the SEC has attempted to define the term "tender offer". *Id.* at 1.

A tender offer may be used either to acquire control of a company or for nontakeover purposes. Recently, most tender offers have been for the purpose of gaining control over the target. For a more detailed description of tender offers, *see* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv.L.Rev. 1250, 1251-54 (1973); Note, *Cash Tender Offers*, 83 Harv.L.Rev. 377, 377-81 (1969), and the sources cited in the note.

sents questions whether the Idaho law, as McEldowney seeks to apply it here, may stand under the supremacy and commerce clauses of the United States Constitution and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the 1934 Act), as amended by the Williams Act.[3] The basic questions applicable to all state takeover statutes have never been decided by a federal court of appeals.[4] Because this suit was brought in Texas, not Idaho, the case also raises novel questions of jurisdiction and venue. The district court determined that the prerequisites of personal jurisdiction and venue were satisfied. After a hearing on the merits, the court declared the Idaho statute unconsti-

[3]Pub.L. No. 90-439, 82 Stat. 454, July 29, 1968 (embodied in §§ 13(d), 13(e), 14(d), 14(e) and 14(f); 15 U.S.C. §§ 78m(d), 78m(e), 78n(d), 78n(e), 78n(f)).

[4]In most tender offers speed is of utmost importance. Rather than accept the delay that a court challenge to state law would require, most offerors either settle their differences with incumbent management or abandon their offers. Indeed, some observers feared that the courts would never have an opportunity to rule definitively on the important questions raised in this appeal. *See, e. g.*, Sommer, *Commentary, State Takeover Statutes and New Takeover Strategies*, 32 Bus.L. 1483, 1485 (1977).

tutional because the 1934 Act preempts it and because it creates a burden on interstate commerce forbidden by article I, § 8, cl. 3 of the Constitution. *Great Western United Corp. v. Kidwell,* N.D.Tex.1977, 439 F.Supp. 420. McEldowney, joined by several states as amici,[5] strongly objects to all these rulings. We affirm the district court's rulings that personal jurisdiction existed and that venue was proper. On the merits, we agree with the position of the Securities and Exchange Commission (SEC) that the Williams Act preempts Idaho's takeover law because the state statute "presents a serious conflict with the administration of the federal program for the regulation of tender offers". SEC amicus brief at 47. We also affirm the district court's commerce clause ruling.

I.

FACTS

Sunshine Mining and Metal Co. (Sunshine) is a publicly owned company incorporated in the State of Washington. Its principal executive office and over fifty percent of its assets are located in Idaho. Sunshine has a wholly owned subsidiary with manufacturing facilities based in Maryland. In addition, Sunshine engages in significant business activities in New York. The shareholders of Sunshine live throughout the United States. Its securities are traded on the New York Stock Exchange. They are not registered in Idaho.

[5]Ohio filed a brief and participated in oral argument. Utah and New York filed briefs. Louisiana joined in Ohio's brief, and Wisconsin joined in a portion of New York's brief.

In March 1977, Great Western decided to make a tender offer for 2,000,000 shares of Sunshine common stock.[6] The tender offer of a net price of $15.75 a share was offered Sunshine shareholders across the United States. Because the tender offer was national in scope and the means and facilities of interstate commerce and the mails were necessary tools in making the tender offer, Great Western was required to comply with the provisions of the Securities Exchange Act of 1934 governing corporate tender offers.[7]

The Williams Act includes disclosure requirements, substantive restrictions on tender offers, and a general antifraud provision. It also confers broad rule-making authority upon the SEC.[8] The disclosure provisions of § 14(d)(1), 15 U.S.C. § 78n(d)(1), require specified information from any party making a tender offer which would result in that party's ownership of more than five percent of a class of equity securities registered under the 1934 Act. That information includes the purchaser's identity and background, the amount and source of the funds used for the purchase, the purpose of the purchase, any plans for liquidation, merger, or other significant changes in business or corporate structure of the target company, the

[6]On March 18, 1977, three days before it announced its tender offer, Great Western revealed that it had agreed to purchase, from the Hecla Mining Company and the Silver Dollar Mining Company, 334,070 shares of Sunshine, representing about six percent of Sunshine. In December 1976 Hecla and Silver Dollar had underwritten an unsuccessful proxy fight to oust Sunshine's management. Great Western agreed that if it successfully gained control of Sunshine, it would reimburse Hecla and Silver Dollar up to $200,000 for their proxy fight expenses.

[7]15 U.S.C. §§ 78*l*(i), 78m(d)-(e), 78n(d)-(f) (1970).

[8]Although the Williams Act has been amended, Congress has not changed the basic approach to the regulation to tender offers adopted in the original statute.

number of shares the purchaser owns, and the details of any agreements with other parties concerning shares in the target corporation.[9]

On March 21, 1977, Great Western filed a Schedule 13D with the SEC disclosing the information specified in the Williams Act.[10] The same day, Great Western publicly announced its intention to make a tender offer for 2,000,000 shares of Sunshine.

Had only the Williams Act regulated Great Western's proposed tender offer, the offer would have commenced on March 21, 1977.[11] Idaho's takeover statute, however, also applied to Great Western's offer.[12] In addition, the laws of New York and Maryland arguably applied to the offer.

Idaho's takeover law required Great Western, among other things, (1) to submit to the Director of the Idaho Department of Finance a preeffective filing disclosing Great Western's intention to make a tender offer and the

[9]The provisions of the Williams Act are summarized in Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv.L.Rev. 1250, 1254-60 (1973).

[10]Schedule 13D was the disclosure form for tender offerors at the time Great Western made its offer for Sunshine. The current disclosure form for tender offerors is Schedule 14D.

[11]Sunshine filed suit against Great Western in the District of Idaho alleging violations of the Williams Act. Such a filing, however, does not automatically stop a tender offer. On April 22, 1977 the district court denied a preliminary injunction in Sunshine's Williams Act suit. The court held that Sunshine had shown neither irreparable harm nor a probability of success on the merits with regard to its claims of non-disclosure. *Sunshine Mining Co. v. Great Western United Corp.*, D.Id., 1977, [1977-78] CCH Fed.Sec.L.Rep. ¶ 96,049.

[12]Idaho Code § 30-1501(6) defines a "target company" as, among other corporations, a company with its principal office in Idaho or with substantial assets located in Idaho. Sunshine clearly fell within both these definitional requirements.

terms of the offer,[13] (2) to transmit, at the same time, a copy of that filing to Sunshine;[14] (3) to publish an advertisement describing the intention to make an offer and the proposed material terms;[15] (4) to pay the Idaho registration fee;[16] (5) to participate in a hearing, which would be mandatory if Sunshine requested one,[17] and (6) to delay its tender offer until the final determination of any administrative or injunctive proceeding brought by the Director of Finance for violation of the Idaho takeover law.[18] No time limitation is placed on whether, or when, the director must rule on the effectiveness of a registration statement.[19] The director may summarily delay the effectiveness of an offer if he determines that the registration statement is insufficient.[20] Great Western's offer would not have been subject to these requirements if the terms of the tender offer had been accepted by Sunshine's board of directors.[21]

Idaho Code § 30–1503(1) states, in part, that "It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director". As interpreted by the Idaho Department of Finance, this provision would prevent Great

[13]Idaho Code §§ 30-1503(1)-(2).

[14]Idaho Code § 30-1503(1).

[15]Idaho Code § 30-1503(1); Definitions of the Rules and Regulations for Chapter 15 of the Idaho Statutes, The Idaho Corporate Take-Over Law ¶ 6.

[16]Idaho Code § 30-1508. The fees range from $500 to $5,500.

[17]Idaho Code § 30-1503(4).

[18]Idaho Code § 30-1506(5).

[19]*See* Idaho Code §§ 30-1503, 30-1506(6).

[20]Idaho Code § 30-1503(3).

[21]Idaho Code § 30-1501(5)(e).

Western from making a tender offer to anyone in the world if it did not comply with the Idaho statute. Violations of the Idaho takeover law can result in criminal penalties of up to $5000 in fines and three years imprisonment.[22]

Great Western initially tried to comply with Idaho law. The company made informal inquiries about the Idaho requirements. On March 21, 1977, Great Western filed documents with the Idaho Commissioner of Finance in an attempt to satisfy Idaho's statute. This was the first filing ever made under the Idaho takeover law. On March 25 Melvine Baptie, then the Director of the Idaho Department of Finance, wrote Great Western raising numerous objections to the disclosure Great Western had made and asking that amendments be made. He summarily ordered a delay of the effective date of the Idaho registration and the proposed tender offer. At about the same time, Great Western's counsel in New York were advised by the New York Attorney General's office that New York was "leaning" toward asserting jurisdiction over the offer for Sunshine. In Maryland, counsel for Great Western were informed that Maryland would not comment on the applicability of its takeover law without a hearing. At this point, therefore, Great Western was faced with the problem of meeting the requirements of three state takeover statutes, each containing some provisions seemingly in conflict with the Williams Act.

Compliance with the state statutes on tender offers would have required Great Western to wait for New York and Maryland to rule on the applicability of their laws, to attempt to add the amendments proposed by Baptie, and to wait for the Idaho hearing and judicial review procedures

[22]Idaho Code § 30-1510.

to take place. To avoid this delay and also to avoid conflicting requirements, Great Western filed suit in the Northern District of Texas, on March 28, 1977, against the state officials responsible for enforcing the Idaho, New York, and Maryland takeover laws. The suit sought an order declaring that the Idaho, New York, and Maryland takeover acts were invalid insofar as they purport to apply to interstate cash tender offers for the purchase of securities traded on a national securities exchange. On April 1, 1977, the district judge issued a temporary restraining order directing the officials of the three states not to assert jurisdiction over the tender offer for Sunshine. The defendants sought emergency relief in this Court. On April 5, 1977, this Court stayed the TRO and directed the district court to make findings on personal jurisdiction and venue before deciding the merits of Great Western's complaint.

After a hearing, the district court ruled that it had personal jurisdiction over the New York and Idaho defendants and that venue was proper. The district court dismissed the claim against the Maryland defendants because it concluded that Maryland had never demonstrated an actual and present intention to enforce its statute against Great Western. The district judge refused to certify an interlocutory appeal from these rulings, and this Court denied a request by the defendants for a writ of mandamus. The case proceeded to a hearing on the merits in the district court. The trial judge issued his opinion, reported at 439 F.Supp. 420, on September 2, 1977. He dismissed the case against New York as moot because New York had informed Great Western in a letter dated May 20, 1977 that it would not assert jurisdiction over the Great Western tender offer for Sunshine. The district court held that the Idaho Take-

over Act is preempted by the Williams Act and is in violation of the commerce clause of the United States Constitution. The court granted a declaratory judgment and injunctive relief against the Idaho officials, but stayed the effect of the order to permit the defendants to file an application for a stay of the judgment. This Court denied that application on September 16, 1977, but expedited hearing of this appeal.

The district court's order, and a settlement of other litigation concerning the Great Western offer for Sunshine, allowed Great Western to acquire the desired Sunshine shares in the Fall of 1977.[23] Nevertheless, Idaho officials could take action if this Court were to reverse the district court. Idaho Code § 30–1509 would allow the officials to seek an appropriate injunction or to require rescission of the stock purchases. Despite its acquisition of 2,000,000 shares through its tender offer, Great Western does not have sufficient votes on the Sunshine Board to take advantage of the exemption from the Idaho takeover law for offers approved by the target board of directors. Therefore, the issues before us are not moot.

II.

JURISDICTION OVER THE IDAHO STATE OFFICIALS

A. Subject Matter Jurisdiction.

The district court held that subject matter jurisdiction

[23]Sunshine's Williams Act suit against Great Western was settled and dismissed by the district court on October 5, 1977, after the entry of the district court's order in the case now on appeal. The settlement provided that Great Western would offer $15 per share for up to 1,275,000 shares. Great Western also agreed to exchange securities or notes worth $15 per share for the balance of the 2,000,000 shares it had originally sought.

over Great Western's challenge to the Idaho takeover law existed under 28 U.S.C. § 1331 (federal question cases), 28 U.S.C. § 1332 (diversity cases), 28 U.S.C. § 1337 (cases based on acts regulating commerce), and 15 U.S.C. § 78aa (Section 27 of the 1934 Act). On appeal McEldowney explicitly protests only the lower court's conclusion that Great Western's complaint stated a claim under the 1934 Act and, implicitly, the conclusion that jurisdiction exists under § 1337. It is undisputed, therefore, that subject matter jurisdiction exists.

B. The Effect of Ex Parte Young.

It is hotly disputed whether a court in the Northern District of Texas could assert personal jurisdiction over the Idaho officials who enforced the Idaho takeover law. Initialy, McEldowney contends that his status as a state official means that even though he may be sued under *Ex Parte Young,* 1908, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, he may not be sued outside Idaho without his consent. He reads *Young* narrowly, to strip state officials of their "state" status *only* to allow a suit under the Eleventh Amendment. For all other purposes, so he contends, this suit is against a state.

McEldowney emphasizes that Young was sued in his own state and argues that *Young* offers no support for the proposition that a state official suable under *Young* is to be treated as any other individual litigant. Although not challenging the validity of *Ex Parte Young,* the appellant labels its result a "fiction" and suggests that the fiction should not be allowed to become fantasy. There is nothing new about characterizing *Young* as a fiction, but usually it is

termed a "necessary" fiction. L. Tribe, *American Constitutional Law,* 146 (1978). *Ex Parte Young* has become one of the cornerstones of our legal system. The Supreme Court recently refused to overrule or restrict the decision. *Rey v. Atlantic Richfield Co.,* 1978, —— U.S. ——, 98 S.Ct. 988, 994 n. 6, 55 L.Ed.2d 179. We see no reason, in policy or in the language of Justice Peckham's opinion, to limit the effect of *Young* as Idaho's Director of Finance asks us to do. The argument that *Ex Parte Young* leaves a state official with all the prerogatives of a state other than eleventh amendment immunity is undercut by the crucial paragraph in the decision:

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case *stripped* of his official or representative character, and is *subjected in his person* to the consequences of his individual conduct. The state has *no power* to impart to him *any* immunity from responsibility to the Supreme authority of the United States.

209 U.S. at 159—60, 28 S.Ct. at 454 (emphasis added). *See also Caldwell v. Sioux Falls Stock Yards Co.,* 1917, 242 U.S. 559, 37 S.Ct. 224, 61 L.Ed. 463. In that case the Court held that a suit challenging the South Dakota Blue Sky Law "manifestly is not one against the state".

We read *Young* to say that a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young,* the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act. 209 U.S. at 159, 28 S.Ct. 441; Scott, *The Increased Control of State Activities by the*

Federal Courts reprinted in 3 *Selected Essays on Constitutional Law* 1077, 1084 (1938).[24] If so, the official gains no protection at all from his connection with the state on other matters. *See* Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation,* 50 Harv. L.Rev. 956 (1937). The dearth of previous cases where a state official has been sued outside his home state is probably attributable to the states having rarely, if ever, enacted statutes similar to the Idaho takeover law (and most other state takeover laws) that purport to extend a local official's regulatory jurisdiction to other states. If, as Idaho contends through McEldowney, the federal system is involved, then that system compels Idaho to yield to the supremacy clause.

C. Personal Jurisdiction Under the Texas Long Arm Statute.

Under Federal Rules of Civil Procedure 4(d)(7) and 4(e), personal jurisdiction in diversity cases, federal question cases, and cases involving acts affecting commerce may, if necessary, be obtained through the long arm statute of the forum state. *Wilkerson v. Fortuna Corp.,* 5 Cir. 1977. 554 F.2d 745, 747; 4 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 1112, 1114 (1969). The Texas long arm statute, Tex.Rev.Civ.Stat.Ann. art. 2031b (Vernon), applies to individual as well as to corporate nonresidents. It authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. *Jetco Electronic Industries, Inc. v. Gardiner,* 5 Cir. 1973, 473 F.2d 1228; *Product Promo-*

[24] Our conclusion that under *Young* the state has no interest in this lawsuit leads us to reject New York's argument that service of process must be made pursuant to Fed.R.Civ.P. 4(d)(6).

tions, Inc. v. Cousteau, 5 Cir. 1974, 495 F.2d 483; *U-Anchor Advertising, Inc. v. Burt,* Tex., 1977, 553 S.W.2d 760.

The question is whether due process permits a court in Texas to exercise jurisdiction over the Idaho official who has enforced the Idaho takeover law to prevent a Texas-based corporation from proceeding with a national tender offer. We hold that it does.[25]

The framework for our due process analysis comes from seven Supreme Court cases: *International Shoe Co. v. Washington,* 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; *Travelers Health Ass'n v. Virginia,* 1950, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154; *Perkins v. Benguet Consol. Mining Co.,* 1952, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485; *McGee v. International Life Ins. Co.,* 1957, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223; *Hanson v. Denckla,* 1958, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283; *Shaffer v. Heitner,* 1977, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683; and *Kulko v. Superior Court,* 1978, —— U.S. ——, 98 S.Ct. 1690, 56 L.Ed.2d 132. *See generally* 2 J. Moore, *Moore's Federal Practice* ¶ 4.25[2]–[4](2d ed. 1974); 4 C. Wright & A Miller, §§ 1065–67. These cases establish that

> the governing principle is the fairness of subjecting a defendant to suit in a distant forum. Only if the non-resident defendant has such "minimum contacts" with the state "that the maintenance of the suit does not offend 'traditional notions of fair plan and justice'," *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), or if the defendant has performed some act "by which [it] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Insurance Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), may the forum, consistently with due process, extend its long arm to embrace it.

Jetco Electronic Industries, 473 F.2d at 1234; *See also Product Promotions, Inc.,* 495 F.2d at 494. Of necessity, inquiries into whether the exercise of personal jurisdiction is permissible in a particular case are sensitive to the facts of each case. 2 J. Moore, ¶ 4.25[5] at 1172.

The appellant argues that all his activity took place in Idaho. "Minimum contacts", however, need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice. *See, e.g., Wilkerson v. Fortuna Corp.,* 554 F.2d at 748; *Product Promotions, Inc. v. Cousteau,* 495 F.2d at 496; *Travis v. Anthes Imperial Ltd.,* 8 Cir. 1973, 473 F.2d 515; *Eyerly Aircraft Co. v. Killian,* 5 Cir. 1969, 414 F.2d 591; *Hitt v. Nissan Motor Co., Ltd.,* 1975 S.D.Fla., 399 F. Supp. 838, *vacated on other grounds,* 5 Cir. 1977, 552 F.2d 1088; *Maricopa County v. American Petrofina, Inc.,* 1971 S.D.Cal., 322 F.Supp. 467; 4 C. Wright & A. Miller § 1069. Very little purposeful activity is necessary to satisfy the minimum contacts requirements. *Benjamin v. Western Boat Building Corp.,* 5 Cir. 1973, 472 F.2d 723, 726.

A corporation, of course, acts only through its directors and officers. When all of these directors and officers, as well as the major shareholders of the corporation, are lo-

[25] State law in this case goes to the limits of due process under the federal constitution. Accordingly, we need not discuss whether state or federal law governs amenability to suit when a state long arm statute is used to secure personal jurisdiction in a federal question case. *See* 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1075 (1969).

cated in Dallas at the time corporate decisions are made, the corporation is acting in Dallas. When the Idaho officials, through the Idaho takeover statute, asserted jurisdiction over the Great Western offer for Sunshine, they foreseeably caused efforts in Texas to comply with the Idaho state law. When the Idaho officials summarily delayed the effectiveness of Great Western's tender offer for Sunshine, they foreseeably restrained a corporation in Dallas from proceeding with its plans. In other words, the Idaho officials regulated a corporation that acts in the Northern District of Texas and through that regulation foreseeably changed the corporation's actions. These effects—effects with substantial consequences on important business plans—are more than sufficient to satisfy the minimum contacts requirement.

In *Kulko v. Superior Court,* 1978, —— U.S. ——, 98 S.Ct. 1960, 56 L.Ed.2d 132, the Supreme Court rejected an effort by a California court to assert personal jurisdiction over a non-resident on the basis of the effects his out-of-state conduct had in California. *Kulko,* however, does not change the basic approach to personal jurisdiction enunciated in prior Supreme Court decisions. It continues to recognize that the existence of personal jurisdiction turns upon the facts of each case. —— U.S. ——, 98 S.Ct. at 1694. The facts in *Kulko* are not so similar to the facts of *Great Western* that they control the outcome in our case.

The California court asserted personal jurisdiction (in a case concerning a separation agreement signed in New York) over a New York citizen solely because "by consenting to his children's living in California [with his former wife], appellant had 'caused an effect in th[e] state' warranting the exercise of jurisdiction over him". —— U.S. at ——, 98 S.Ct. at 1695, *quoting* 133 Cal.Rptr. 627, 628. The Supreme Court concluded that this effect was so insignificant that it was not reasonable for California to assert personal jurisdiction over the father. —— U.S. at ——, 98 S.Ct. at 1698-1699. It is not surprising that the Court found some effects are too insignificant to support personal jurisdiction; even physical contacts can be too insubstantial to establish personal jurisdiction. *See* —— U.S. at ——, 98 S.Ct. at 1698. That the subject matter of the underlying suit concerned domestic relations and child custody also influenced the Supreme Court's evaluation of the reasonableness of California's assertion of jurisdiction. The Court noted several times that Kulko's children expressed the wish to live with their mother and that Kulko acted in his children's best interest by honoring that preference. The Court expressed concern that a parent might hesitate to allow such moves if doing so would subject him to personal jurisdiction in a distant state. *See, e.g.,* —— U.S. at ——, ——, 98 S.Ct. at 1698, 1699.

Kulko does not hold that a court considering an *International Shoe* question may not look to effects within the forum unless the defendant's effect-producing activity causes physical injury within the forum state or affects the defendant's commercial transactions within the forum state. Justice Marshall discussed those factors to support his conclusion that the effect in *Kulko* could not support personal jurisdiction in California. He did not establish new general restrictions on the use of the effects test in the application of *International Shoe.*

The effects felt in Texas as a result of Idaho's regulation of Great Western's tender offer were more substantial than those felt in California when Kulko allowed his children to join their mother. Idaho's out-of-state regulation had the *direct* effect of stopping a substantial commercial venture based in Texas. No other state had a greater connection with that venture than Texas. In contrast, New York had more extensive connections than California with the separation agreement at issue in *Kulko.* Idaho's "business" is to regulate. It was conducting that business in Texas. Our case, therefore, is more analogous to an insurer's sending an insurance contract and premium notices into a state to an insured resident of the state than to the domestic controversy between Kulko and his former wife. *Compare McGee v. International Life Insurance Co.,* 1957, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 *with Kulko v. Superior Court,* —— U.S. at ——, 98 S.Ct. at 1699. One could also analogize the actions of Idaho's officials to the tort of intentional interference with a commercial relationship. *See* W. Prosser, *Handbook of the Law of Torts,* § 129 (4th ed. 1974). The absence in our case of the family consideration stressed by the *Kulko* Court also distinguishes the Supreme Court's recent decision.

McEldowney protests that Great Western came to him with its voluntary filing of March 21, 1977. It is true that unilateral activity by the plaintiff cannot produce the minimum contacts necessary to satisfy due process. *See Hanson v. Denckla,* 357 U.S. at 250-53, 78 S.Ct. 1228; 4 J. Moore ¶ 4.25[5]. "[W]e have, nevertheless, unequivocally required *some* activity by the defendant . . . ." *Benjamin v. Western Boat Building Corp.,* 472 F.2. at 726 (emphasis

in original). In *Hanson v. Denckla,* a Florida court asserted jurisdiction over a Delaware Trust Company. The only connection asserted between the Company and Florida occurred because the trustee, who had created the trust in Delaware, moved to Florida where she received some trust income and engaged in various acts of trust administration. The Trust Company had nothing to do with the trustee's decision to move. The case before us is different. It may be true that Great Western came to Idaho with a filing. It is also true that Great Western had little choice; the alternative for its officers was to risk criminal penalties under Idaho Code 30-1510. The first step in the sequence came not from Texas, but from Idaho, where the filing requirement binding on Great Western was created. Furthermore, Idaho's regulatory activities after the filing, including the order delaying the effectiveness of the tender offer, constituted affirmative action by Idaho officials causing foreseeable effects in Texas. The decision to issue a regulatory order having inevitable extraterritorial effects cannot be compared with the routine remission of trust receipts to a trustee who has moved to another state.[26]

McEldowney stresses language from *Hanson v. Denckla* that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,

[26]The Supreme Court's *Kulko* opinion expresses some concern that allowing jurisdiction in *Kulko* might undermine the principle that a plaintiff cannot unilaterally create the contacts that support personal jurisdiction. The Court points out that the plaintiff-mother moved to California, and that the defendant-father did no more than acquiesce in his children's move to the West Coast. That personal jurisdiction in this case is clearly based on actions by the defendants further distinguishes *Kulko.*

thus invoking the benefits and protections of its laws". 357 U.S. at 253, 78 S.Ct. at 1240. The Idaho official denies that he did such an act.

Judge Goldberg, after a thorough study of the Supreme Court cases, concluded that this language "should not be read too literally" and that essentially it reflects the Court's rule that unilateral action by the plaintiff cannot create the necessary relationship between the defendant and the forum state. *Product Promotions, Inc. v. Cousteau,* 495 F.2d at 496.[27] Personal jurisdiction has been found to exist over price fixing conspirators whose illegal activities in one state were designed to control prices in the forum state. *Hitt v. Nissan Motor Co., Ltd.,* 1975 S.D.Fla., 399 F.Supp. 838, *vacated on other grounds,* 5 Cir. 1977, 552 F.2d 1088; *Maricopa County v. American Petrofina, Inc.,* 1971 S.D.Cal., 322 F.Supp. 467. Those conspirators, of course, had not invoked the benefits and protections of the forum states' laws in a restrictive sense.

Even if we were to read the requirement of *Hanson v. Denckla* more literally, it would be satisfied in this case. The activities of the defendant officials were to regulate tender offers. The impact of their regulation was felt in Texas, as they intended it to be. Thus, they did conduct activities in Texas. If Great Western had failed to comply with the Idaho takeover law, and the Idaho officials had

[27]By following *Product Promotion's* interpretation of *Hanson v. Denckla* we do not hold, as the dissent suggests we do, that *Hanson v. Denckla's* requirement that a defendant purposefully avail himself of the benefit of state law has been eliminated. None of the cases cited in the dissent conflict with *Product Promotion's* holding that the *Hanson v. Denckla* language should be read as a restatement of the due process rule that the defendant must create sufficient contacts with the forum before a state may assert personal jurisdiction over him.

obtained criminal sanctions, no doubt the state officials would have expected Texas to honor those criminal judgments. Indeed, if the Texas courts did not, the sanctions might have little effect since none of Great Western's officers reside in Idaho. Idaho might also ask for Texan help if violators of the takeover residing in Texas refused to go to Idaho for trial. Idaho was depending, at least in part, upon Texan cooperation to make its enforcement mechanism effective.[28]

The most fundamental difference between the dissenting and majority opinions in this case arises over the requirement of the Supreme Court cases that an assertion of personal jurisdiction not "offend traditional notions of justice and fair play". Questions of reasonableness are invariably ones of judgment where "[t]he greys are dominant and even among them the shades are innumerable". *Kulko v. Superior Court,* —— U.S. at ——, 98 S.Ct. 1695, 1697. In

[28]This discussion is to satisfy those who insist that the *Hanson v. Denckla* language about a defendant's availing himself of the benefit of the forum's laws establishes an independent test. It is possible to envision a role for Texas in the enforcement of Idaho's statute. As the dissent points out, this role becomes an active one only if Idaho tries to enforce its law in certain circumstances, such as against Texas defendants who refuse to leave Texas and return to Idaho. The dissent's major objection to this discussion is that it makes the *Hanson v. Denckla* requirement too easy to satisfy, not that it is impossible to envision a role for Texas in the enforcement of Idaho's law. The dissent fears that governors, state prosecutors, and other state regulatory officials will be subject to countless out-of-state civil suits simply because they might at one time rely upon another state's extradition procedures for the full faith and credit clause of the Constitution. Governors, state prosecutors and other state regulatory officials need fear no such outcome from the majority opinion. That a defendant in some manner benefits from a state's laws does not *automatically* mean that *International Shoe's* due process requirements, are satisfied. That benefit is only one factor for a court to consider, and it is a factor to discount if the benefit is attenuated or speculative. Jurisdiction over the Idaho officials in Great Western's suit is supported by much more than Idaho's possible need for Texan help with the enforcement of the penalties in its takeover law.

its evaluation, the dissent gives too little emphasis to the uniqueness of the state takeover laws. Idaho's statute seeks to regulate the sale of a security even when neither the buyer nor the seller nor the sale itself has *any* connection with Idaho. *See generally* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case Wes.Res.L. Rev. 722, 756 (1970). The Idaho officials deliberately cast their regulatory net across the United States. They knew those regulations would entangle transactions with no connection to Idaho. It is not unfair or unreasonable to require an Idaho official to travel from his home when one of the participants in a non-Idaho transaction challenges the constitutionality of Idaho's interference. Although the Idaho officials may have been inconvenienced by the need to appear in Texas, they had ample resources to do so.

The state officials and the dissent argue that it is unreasonable for a court in Dallas to assert personal jurisdiction over the defendants in this case because doing so will lead to numerous other out-of-state suits against state officials who enforce other state regulations with interstate impact. One paragraph, in particular, of the district court's memorandum order disturbs McEldowney:

> The practical effect of the Idaho defendants' actions is to regulate business activities of Great Western and the investment opportunities of shareholders of Sunshine in Texas and every other state. The court does not therefore find it unfair to make the Idaho defendants appear where the predictable consequences of their purposeful actions are felt.

439 F.Supp. at 433 (footnote omitted). McEldowney reads this paragraph to mean that personal jurisdiction over a

state official is reasonable and proper whenever the statute he enforces has a "practical effect" in a forum state.

This would, indeed, be an expansive construction. We consider this to be an unfair reading of the district court's opinion; nor is such a holding necessary to justify personal jurisdiction in this case. In our view, the crucial conclusion in the quoted paragraph is not that the actions of the Idaho defendant under the Idaho takeover law had a "practical effect" in Texas, but that they amounted to the regulation of Great Western's Texas-based business activities. Because we have concluded that this extraterritorial regulation provides the necessary contacts with Texas, we need not rely upon the district court's further and broader conclusion that impact on shareholders also provides the contacts necessary to satisfy due process.

The contention that our holding will permit countless other out-of-state lawsuits against state officials ignores the concededly unique characteristics of state takeover laws such as Idaho's. We do not share the dissent's difficulty distinguishing the Idaho takeover statute from other regulations. In none of the examples it cites is there a comparable lack of *any* connection between all parties to a transaction, as well as the transaction itself, and the regulating state. For instance, it is true that the California pollution law impacts out-of-state automobile manufacturers. But it is also true that almost all the customers who buy and drive those cars are California residents. Blue Sky laws—in notable contrast to the Idaho takeover law—regulate only sales of securities within the regulating state. Insurance laws have a similarly limited scope. Business

qualification regulations affect only companies that wish to operate within the regulating state. And food purity laws cover only sales of food to customers within the regulating state. When, as in these examples, the regulating state has a substantial connection with at least one side of a regulated transaction, it may be unreasonable to require state officials to defend their regulations in out-of-state forums even though there are foreseeable effects in a foreign state sufficient to satisfy the minimum contacts branch of *International Shoe's* requirements. That, however, is simply not the situation in this case.

D. Section 27 of the 1934 Act.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa(1970), provides in relevant part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Under the final clause, a federal court has jurisdiction over the person of a defendant in an action under the 1934 Act so long as the manner of service is proper and constitutional limits on extraterritorial service are respected. *A.L. Black v. Acme Markets, Inc.*, 5 Cir. 1977, 564 F.2d 681.

The manner of service is not contested on appeal; we have already held that any constitutional limits on extraterritorial service have been respected.[29] If Great Western's complaint states a claim under the 1934 Act, § 27 provides another basis for personal jurisdiction.

Section 28 of the 1934 Act, 15 U.S.C. § 78bb (1970) is helpful to Great Western. That section provides in relevant part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

This language impliedly prohibits a state official from enforcing a statute that conflicts with the 1934 Act. Great Western's claim that the Idaho takeover law conflicts with the Williams Act, therefore, appears to state a claim under § 28.

McEldowney responds that the only possible claims under the 1934 Act are those to prevent and punish fraud in the purchase and sale of securities. Section 28 prohibits no conduct; to the contrary, it preserves the right of states to regulate. Finally, he argues that Great Western's construction of § 28 would mean that by enforcing the Idaho takeover law the state officials "violated" the 1934 Act and became subject to criminal penalties under § 32, 15 U.S.C.

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[29]Because we have found the *International Shoe* requirements to be satisfied, we, like the court in *Black v. Acme Markets, Inc.* may defer the question whether those requirements apply to federal courts sitting in federal question cases brought under statutes providing for worldwide service of process. *See* Judge Goldberg's discussion in *Black*, 564 F.2d at 686 n. 8.

§ 78ff(a)(1970).[30] Since Congress could not have intended to make such conduct criminal, McEldowney concludes that enforcement of a law that conflicts with the 1934 Act cannot be a violation of that Act, and that § 28 is not relevant to this proceeding. Great Western's contention, he argues, is one under the supremacy clause of the Constitution, not under the 1934 Act.

The attempted distinction between § 28 and the supremacy clause is not persuasive. Section 28 essentially restates the supremacy clause, making it a statutory as well as a constitutional requirement. *See* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 225 (1977). Thomas Corcoran, one of the principal draftsmen of the 1934 Act, pointed out to the Senate Committee on Banking and Currency that § 28 stated a rule that is true of any federal statute because of constitutional requirements. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) pt. 15, National Securities Exchange Act of 1934*, 73d Cong., 1st Sess. 6577 (1934). Nor is the lack of prohibitory language in § 28 significant. The commerce clause, for instance, is written only as an affirmative grant of power to Congress. Without any difficulty, courts find that the language also imposes self-executing limitations on regulation by the

[30]Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . shall upon conviction be fined not more than $10,000, or imprisoned not more than two years or both . . . but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

states. *E. g.*, P. Brest, *Processes of Constitutional Decisionmaking* 206 (1975). Finally, the absence of previous cases relying upon § 28 to invalidate a state law is not controlling. As we have already noted, the state takeover laws pose highly unusual, if not unique, questions in the subject of securities regulation.

To interpret § 28 to require states not to enact or enforce laws that conflict with the 1934 Act and to hold that § 27 applies to a suit to enforce that requirement is not to subject officials of states with offending statutes to the risk of imprisonment or fine. McEldowney argues that "violation" is the key word in § 27, and that an act that is a "violation" in § 27 terms is automatically within the scope of § 32(a) criminal liability. The SEC, in oral argument, suggested that a suit based on § 28 would be one to enforce a duty created by the 1934 Act and that the concept of a "violation" would not be relevant.

It is not necessary to parse § 27 to determine if this distinction between a "violation" of the 1934 Act and a failure to honor a "duty" created by the Act is valid.[31] Even if

[31]Our impression, however, is that the SEC is correct. The first sentence of § 27 provides "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, *and* of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." (Emphasis added). This sentence supports the SEC's argument, for it draws a clear distinction between violations and suits to enforce a duty created by the 1934 Act. One difficulty with the SEC's construction of the statute is that the sentence of § 27 establishing jurisdiction and venue over suits to enforce a duty created by the 1934 Act refers back to the preceding sentence that is cast in terms of "violations".

"violation" is the key word in § 27, that word has not been interpreted in the manner urged by Idaho's Director of Finance. The most helpful authority comes from § 16(b) cases.

Section 16(b), 15 U.S.C. § 73p(b) (1970), allows a corporation to recover any profit realized by a corporate insider from short swing trading in the corporation's stock.[32] Nothing in the 1934 Act directly forbids short swing trading by insiders. Instead, such an obligation has been inferred from the profit recapture provision. *E. g., Gratz v. Claughton,* 2 Cir. 1951, 187 F.2d 46, 49 (L. Hand, J.), *cert. denied,* 341 U.S. 920, 71 S.Ct. 741, 95 L.Ed. 1353. Short swing trades are not made unlawful by § 16(b) in the sense that they can result in an indictment. II L. Loss, *Securities Regulation* 1044 (1961). Nevertheless, engaging in short swing trading is a "violation" for § 27 purposes. *Gratz v. Claughton,* 187 F.2d at 49; *Grossman v. Young,* 1947 S.D.N.Y., 70 F.Supp. 970, *petition for prohibition and mandamus denied sub nom. Young v. Rifkind,* 2 Cir., Oct. 13, 1947.

Enforcement of a duty not to make short swing trades fulfills the purpose of § 16(b). *Gratz v. Claughton,* 187 F.2d at 49. Similarly, recognition of a duty not to pass or enforce laws that conflict with the 1934 Act would fulfill the purposes of § 28. Like the duty not to make short swing trades, this duty would not be enforceable through criminal sanctions, but could be violated for purposes of § 27.

We conclude that the wording of § 28 and the legislative

[32]A short swing trade occurs when the purchase and sale of the security occur within six months. *See generally* II L. Loss, *Securities Regulation* 1040-1132 (1961).

history of the 1934 Act show that § 28 was an attempt to incorporate the supremacy clause into the securities laws. Congress, of course, is free to do this. We hold that Great Western stated a claim based on the 1934 Act, and that § 27 is an independent source of personal jurisdiction over the Idaho officials.

III.

VENUE

A. The 1934 Act.

Section 27 of the 1934 Act provides for venue as well as personal jurisdiction. Venue is proper in any district where acts constituting part of the alleged violation of the 1934 Act occurred. The alleged violation consists of enforcing an invalid statute. The regulatory activities by the Idaho officials had their restraining effect at the corporate headquarters of Great Western in Dallas. This was a sufficient act to make venue proper in the Northern District of Texas. *See Travis v. Anthes Imperial Limited,* 8 Cir. 1973, 473 F.2d 515. In addition, Idaho officials sent at least one interstate letter into Texas as part of their regulatory effort. The letter from Baptie outlining his objections to Great Western's filing and announcing that the effective date of the offer would be summarily delayed was more than a trivial part of the interference by Idaho officials with Great Western's securities transactions. Such interstate communication into the forum makes venue proper under § 27. *See, e. g., Hilgeman v. National Insurance Co.,* 5 Cir. 1977, 547 F.2d 298; *Mayer v. Development Co.,* 1975 D.Del., 398 F.Supp. 917.

B. 28 U.S.C. § 1391(b).

Because subject matter jurisdiction in this case is not based solely upon diversity of citizenship, the applicable general venue statute is 28 U.S.C. § 1391(b).

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

The district court followed the rule that a claim can arise in only one district for § 1391 venue purposes. It held that for § 1391 purposes the claim arose in Idaho, and that venue was not proper under the general statute. 439 F.Supp. at 433. We disagree.

The language of 28 U.S.C. § 1391 can be read to provide that a claim may arise, as a matter of law, in only one district. *See, e. g.,* 15 C. Wright, A Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 3806 at 28-29 (1976). Commentators have recognized, however, that a preferable approach would be to equate the availability of compulsory process on a nonresident and proper venue under § 1391. *Id.* at 29; 1 J. Moore ¶ 0.142[5.—2] at 1430. Professor Moore's view is that the current statute can be read to follow such an approach, although he admits this reading is not without difficulty. 1 J. Moore ¶ 0.142[5.—2] at 1431-32. Some courts have moved toward an expansive reading of § 1391. *See, e. g., Gardner Engineering Corp. v. Page Engineering Co.,* 8 Cir. 1973, 484 F.2d 27, 33; *Carter-Wallace, Inc. v. Ever-Dry Corp.,* S.D.N.Y. 1968, 290 F.Supp. 735, 739; 15 C. Wright, A. Miller & E. Cooper § 3806 at 29 n. 18; 1 J. Moore ¶ 0.142[5.—2] at 1433. Our

conclusion that the Idaho officials had sufficient contacts with the Northern District of Texas to make compulsory process available means that venue would be proper under § 1391(b) if the expansive interpretation of the venue statute is adopted.

We may leave that decision for another day, because even if Great Western's claim can arise in only one district, we conclude that the proper district is the Northern District of Texas, not the District of Idaho.[33] The core of Great Western's claim is that the Idaho officials invalidly prevented Great Western from initiating a tender offer for Sunshine. The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint occurred, that place is Dallas.[34] Although the result of Idaho's regulation was that Great Western could not make an offer to Sunshine shareholders who reside in districts throughout the country, the place of restraint, and thus the place where Idaho officials injured Great Western, was in Dallas.[35]

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[33]Even though we conclude that Great Western's claim arose in Texas, venue would have been proper in Idaho as well because that is the judicial district where all defendants reside. *But see* text after note 35 discussing venue in a suit against officials from more than one state.

[34]*Cf.* the suggested rules that a tort claim arises where the injury occurs, not where the negligent act takes place and that a contract claim arises where the contract is to be performed, not in the district where it was written. 1 J. Moore ¶ 0.142[5.—2] at 1434-35 (1977).

[35]The district court erred, in our opinion, by analyzing the alleged violation as a restraint upon Sunshine shareholders who would have tendered rather than as interference with Great Western's plans. That analysis led the district court to conclude that the claim did not arise in Texas because it could be argued equally well that the claim arose in any district where a Sunshine shareholder resided. We might note that an alternative to this conclusion would have been that each restraint of a Sunshine shareholder constituted a separate claim that arose only in the district where that particular shareholder lived.

That the Northern District of Texas is the district where the claim arose, if there can be only one such district, becomes clearer if one notes that New York and Maryland also might have asserted jurisdiction over Great Western's offer. In that event, there would have been no district where all the defendants resided. The apparent purpose of the amendments to §1391, adding the "in which the claim arose" language, was "to assure that at least one venue . . . will be proper as to *all* defendants . . . in a multi-party action". 1 J. Moore ¶ 0.142[5.—2] at 1434 (emphasis added). There is no reason to conclude that the claim against New York or Maryland arose in Idaho. The district judge would have placed the claim in Idaho only because Idaho was the source of the power exerted extraterritorially. Idaho would not have been the source of New York's or Maryland's power. In contrast, if New York or Maryland officials had asserted jurisdiction, the reasons why we believe Great Western's claim against the Idaho officials arose in Dallas would equally apply to them, and a single suit would have been possible.

In summary, on the questions whether the requirements of personal jurisdiction and venue are satisfied, we hold that both are met.[36] Personal jurisdiction existed under the Texas long arm statute, as made applicable by the Federal Rules of Civil Procedure, and the requirements of due process. Personal jurisdiction also existed by virtue of

[36]Several of the amici contend that we should refrain from deciding this case under the *Pullman* and *Younger* abstention doctrines. McEldowney did not raise this point before the district court; nor does he argue it to us. This is not an appropriate case for abstention under either doctrine.

§ 27 of the 1934 Act. Venue is proper under both § 27 of the 1934 Act and 28 U.S.C. § 1391(b).[37]

IV.

PREEMPTION

A. The Legal Criteria.

We now proceed to the district court's substantive holding that federal securities regulation preempts the Idaho statute.

No simple, mechanical formula can summarize the analysis necessary to determine whether a state statute is void under the supremacy clause, U.S.Const. art. I, § 10. *See Goldstein v. California,* 1973, 412 U.S. 546, 561, 93 S.Ct. 2303, 37 L.Ed.2d 163; *Hines v. Davidowitz,* 1941, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581. The nature of a court's inquiries as to this question has been established in earlier cases. The Supreme Court summarized these inquiries in *Jones v. Rath Packing Co.*, 1977, 430 U.S. 519, 525-26, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604:

> The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S.Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must

[37]To the extent our discussion rests on an anticipation of the merits of the case, we rely on the principle that we have jurisdiction to determine so much of the merits as is necessary to decide a jurisdictional dispute. *See, e. g., United States v. United Mine Workers,* 1947, 330 U.S. 258, S.Ct. 677, 91 L.Ed. 884.

fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. [218,] 230, 67 S.Ct. 1152, [91 L.Ed. 1447] [1947].[38]

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S.Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 339, 404, 85 L.Ed. 581 (1940). Accord, *De Canas v. Bica*, 424 U.S. 351, 363, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971); *Florida Lime & Avocado Growers v. Paul, supra*, at 141, 83 S.Ct. at 1217; *id.* at 165, 83 S.Ct. at 1229 (White, J., dissenting). This inquiry requires us to

[38] In *Rice*, the Court discussed some circumstances that show an implicit Congressional desire to preempt all state regulation in a given field:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 1947, 331 U.S. 218, 229-30, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447. *Accord, Pennsylvania v. Nelson*, 1956, 350 U.S. 497, 502-05, 76 S.Ct. 477, 100 L.Ed. 640.

> consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *De Canas v. Bica, supra*, 424 U.S. at 363-365, 96 S.Ct. at 940-941; *Swift & Co. v. Wickham*, 230 F.Supp. 398, 408 (S.D.N.Y.1964), appeal dismissed, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), aff'd on further consideration, 364 F.2d 241 (CA 2 1966), cert. denied, 385 U.S. 1036, 87 S.Ct. 776, 17 L.Ed.2d 683 (1967).

Nothing in the 1934 Act explicitly preempts all state takeover legislation; indeed, § 28 has a contrary tone. We need not reach the question whether Congress implicitly ruled out all state legislation of tender offers when it amended the 1934 Act with the Williams Act. We rely instead on the principles in the second paragraph quoted from *Jones*, and hold that the particular takeover law before us cannot stand because it conflicts with the federal statute. In the words of *Hines*, "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress".

McEldowney relies heavily on the words of § 28 to argue that the Idaho statute is not preempted. This argument applies to both the supremacy clause and to § 28 in that § 28, according to McEldowney, is an express congressional instruction on how to apply the supremacy clause. Appellant's brief at 29-30. This analysis, like ours, focuses on the question whether the Idaho statute "conflicts" with the Williams Act. McEldowney argues further, however, that a "conflict" in this context exists only if it is impossible to meet both federal and state requirements. Because of this

he argues flatly that "[t]he test set out in *Hines* is not relevant". Appellant's brief at 30.[39]

We do not accept this narrow definition of "conflict", nor the dismissal of the *Hines* test. Therefore, although several provisions of the Idaho statute arguably contradict specific provisions of the federal law, we shall not focus on those inconsistencies nor decide whether they would be sufficient to preempt Idaho's law under McEldowney's suggested analysis.[40]

[39]We disagree with the appellant that § 28 sets forth a different test from the test required by the supremacy clause. Nevertheless, we should point out that *Jones v. Rath Packing Co.* casts doubt on McEldowney's assertion that § 28, if interpreted in the narrow way he urges, would eliminate the need to apply the *Hines* test. In *Jones*, the Court interpreted a provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461 (1970), to explicitly pre-empt state law only when compliance with state law would automatically trigger federal enforcement action. 430 U.S. at 540, 97 S.Ct. 1305. The California statute challenged in the *Jones* litigation was not pre-empted under that standard. *Id.* The Court went on, however, to apply *Hines* to the California law, and ruled that under *Hines* the state law was invalid. 430 U.S. at 543, 97 S.Ct. 1305. *See also* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan.L.Rev. 208, 212-15 (1959) where the author discusses how the courts have paid slight attention to general savings clauses in pre-emption cases.

In addition, § 28 arguably does not apply to state takeover statutes. Section 28 was part of the original 1934 Act. It was designed to preserve state Blue Sky laws, which were well established before 1934. In contrast, when Congress enacted the Williams Act only Virginia had a takeover law, and it was enacted just before Congress passed the bill. There is no mention of state legislation in the Senate or House hearings. When subsequent state legislation is not of substantially the same character as the laws Congress intended to save, the savings clause may not save the subsequent state laws. *See* Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competence*, 62 Cornell L.Q. 213, 247 (1977) and sources cited therein.

[40]For instance, the SEC points out that precommencement publication under Idaho Code § 30-1503(1) could arguably be deemed publication to security holders within the meaning of § 14(d)(1) of the Williams Act. SEC amicus brief at 40 n. 137. If so, the ten day period of § 14(d)(6), the provision requiring an officer to purchase

The appellant's definition of "conflict" is too narrow for the usual preemption test; *Jones* unambiguously reaffirms that in general the *Hines* test rather than a more limited examination for contradictions is the proper one. *Jones v. Rath Packing Co.*, 430 U.S. at 526, 97 S.Ct. 1305. Nor does any reason appear to give the term "conflict" a special limited meaning in § 28 of the 1934 Act. The language of the section does not compel such unusual interpretation. The cases and administrative authorities cited in the appellant's brief at best support the narrow definition obliquely, and all are in distinguishable contexts.[41] The SEC, in its role

on a pro rata basis the shares tendered during the first ten days of an offer if too many shares are tendered, would begin. Idaho has a similar provision, Idaho Code 30-1506(3), but its ten day period begins only after the offer is effective under Idaho law. As a result, the Williams Act rights of a shareholder tendering during the first ten days of the federal counting period might be diluted. *See* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 227 (1977). A similar argument can be made about withdrawal privileges. Section 14(d)(5) and Idaho Code 30-1506(2) both make tenders irrevocable between the eighth and sixtieth day of an offer. If the offer is deemed to commence on a different day, however, the two time periods conflict. *See id.*

In addition, Great Western contends that Idaho Code 30-1503 requires offerors to disclose projections that would not be allowed under federal standards because the projections are too uncertain. Tr. at 163.

[41]*SEC v. National Securities, Inc.*, 1968, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 involved not the 1934 Act, but the very different McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, dealing with the regulation of the business of insurance by state or federal law. The language of the case is also not as helpful as the appellant's brief suggests.

Several other cases, including *Travelers Health Ass'n v. Virginia*, 1950, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 and *Crosby v. Weil*, 1943, 382 Ill. 538, 48 N.E.2d 386, are inapposite because they concern state Blue Sky laws. These statutes are very different from the takeover laws, and they involve matters traditionally within the province of state law. *See also* footnote 39.

Two two cited Investment Advisors Act releases concern a different statute. They also represent the opinion of the SEC, which has

as an amicus curiae in the case, rejects such a narrow reading. SEC amicus brief at 45–47. This administrative interpretation is entitled to deference. *See Fawcus Machine Co. v. United States,* 1931, 282 U.S. 375, 51 S.Ct. 144, 75 L.Ed. 397; Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1340-47 (tent. ed. 1958); Note, *Preemption as a Preferential Ground: A New Canon of Construction,* 12 Stan.L.Rev. 208, 216-17 (1959). Finally, the legislative materials discussed in Part III of this opinion show that the draftsmen of § 28 intended to restate the supremacy clause. That being so, there is no reason to substitute a narrow meaning of "conflict" for that enunciated by the Supreme Court in *Hines, Jones,* and other cases.

B. The Conflict Between the Idaho Takeover Statute and the Williams Act.

The underlying purpose of the Williams Act is to protect investors. *Piper v. Chris-Craft Industries, Inc.,* 1977, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124. Congress chose this goal in the Williams Act and adopted a distinct means of achieving it. Essentially, Congress relied upon a "market approach" to investor protection. The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.[42] In identical

rejected the narrow reading of "conflict" in its brief for this case. Finally, the language of the releases offers no substantial support for the appellant's point. They only note in passing that state requirements not in conflict with federal law are valid. They do not define "conflict".

[42]Hearings on H.R. 14475, S.510 Before the Subcommittee on Commerce and Finance, 90th Cong. 2d Sess. 4, 47-48 (1968) (House

language the Senate and House Reports explained, "This bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision".[43] In *Rondeau v. Mosinee Paper Corp.,* 1975, 422 U.S. 49, 58, 95 S.Ct. 2069, 45 L.Ed.2d 12, the Supreme Court noted that Congress wanted to give each side an opportunity to express and explain its position without giving target management a weapon against takeover bids. *See also, Humana, Inc. v. American Medicorp., Inc.,* S.D.N.Y. 1978, 445 F.Supp. 613.

The reason for this approach was congressional recognition that tender offers often benefit an investor and that a statute preventing tender offers could harm, rather than protect, investors. *E.g.,* S.Rep.No. 550, 90th Cong., 1st Sess. at 3 (1967) (Senate Report); H.R.Rep.No.1711, 90th Cong., 2d Sess. at 3 (1968) (House Report); U.S.Code Cong. & Admin.News 1968, p. 2811. The original bill to amend the 1934 Act, S. 2731, introduced in 1965, sought to protect investors by making it difficult for tender offers to succeed. *See* 111 Cong.Rec. 28257–28259 (1965).[44] This ap-

Hearings); Hearings on S. 510 Before the Subcommittee on Banking and Commerce, 90th Cong. 1st Sess. 17, 19, 25, 182 (1967) (Senate Hearings) (statements of Mr. Cohen), 113 Cong.Rec. 854; Cohen, *Takeover Bids,* Speech to the Association of the Bar of the City of New York, reprinted at Senate Hearings at 204-05; Note, *Commerce Clause Limitations upon State Regulation of Tender Offers,* 47 S.Cal.L.Rev. 1133, 1146 (1974).

[43]S.Rep.No.550, 90th Cong. 1st Sess. 3 (1967); H.R.Rep.No.1711, 90th Cong. 2d Sess. 3 (1968); U.S.Code Cong. & Admin.News 1968, p. 2813.

[44]S. 2731 would have subjected some tender offerors and persons associated with an offeror to the reporting and short swing profit liability provisions on § 16 of the 1934 Act. It would have required persons making cash tender offers and certain other securities acquisitions to make advance disclosure and filings. It also would have granted rulemaking authority to the SEC on the subject of a corporation's purchase of its own securities.

proach attracted considerable opposition, including that of the SEC.[45]

As a result, Congress amended the draft bill to make it less burdensome to offerors. A cornerstone of the revised approach to investor protection was the law's deliberate neutrality among the contestants in a tender offer. The Senate Report explained:

> The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

Senate Report at 3. Virtually identical language appears in the House Report at 3. The Supreme Court has already drawn attention to this language and to the intent of Congress not to take sides in tender offers. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 30–31, 97 S.Ct. 926; *Rondeau v. Mosinee Paper Corp.*, 422 U.S. at 58–59, 95 S.Ct. 2069.

Of course, this language does not mean Great Western has a right under the Williams Act to complete its tender offer successfully. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 34–35, 97 S.Ct. 926. Instead, it creates the investor's right to hear a fair presentation of the offeror's proposal. This investor's right can be carried out, however, only by avoiding regulation that puts the offeror at a disadvantage to incumbent management. Congress recognized

[45] *See* 112 Cong.Rec. 19003 (1966); Senate Hearings at 123 (statements of Prof. Painter and Sen. Williams), 133-34 (statement of Prof. Kaplan).

that delay can seriously impede a tender offer. Senate Report at 5. It rejected legal requirements, such as precommencement review by the SEC, that could delay offers unnecessarily. *Id.* Such delay could prevent the offeror from fairly presenting its case.

In its consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. § 18a (Supp.1977), Congress recently reaffirmed the choice of a market approach to investor protection in the tender offer area, as well as the importance of legal neutrality between offerors and incumbent management to carry out this protection. Congress also reaffirmed its view that regulatory provisions producing more than minimal delay could upset this neutrality. The House Report stated:

> it is clear that this short waiting period [referring to the 10 days required by the Williams Act] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management and permit them to frustrate many pro-competitive cash tenders. This 10-day waiting period, thus underscores the basic purpose of the Williams Act—to maintain a neutral policy toward cash tender offers, by avoiding lengthy delay that might discourage their chances for success.

H.R.Rep.No.94–1373, 94th Cong., 2d Sess. 12 (1976); U.S. Code Cong. & Admin.News 1976, pp. 2572, 2644. Congressman Rodino explained to the House:

> Lengthy delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for

> incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tender offers give to them. . . . *Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so.*

122 Cong.Rec. 10293 (1976) (emphasis added). There is no real dispute that the Idaho statute—like most of the state takeover laws—increases a target company's ability to defeat a tender offer.[46] The Idaho law helps target companies primarily through provisions not found in the Williams Act that give them advance notice of a tender offer[47] and the ability to delay the commencement of an offer, by means such as insisting on a hearing.[48] Most observers of takeover battles agree that time is among the most effective weapons available to a company resisting a tender offer.[49] The Idaho statute favors the target in

[46]*See also* Aranow, Einhorn & Bernstein, *Developments in Tender Offers for Corporate Control* 227-29 (1977); *Federal Securities Code* § 607, comment (2) (Proposed Official Draft 1978); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W.Res.L.Rev. 722, 725 (1970); Sommer, *The Ohio Takeover Act: What is It?*, 21 Case W.Res.L.Rev. 681, 718 (1970); Subcommittee on Proxy Solicitation and Tender Offers, Federal Regulation Securities Committee, American Bar Association, *State Takeover Statute and the Williams Act* reprinted at 32 Bus.L. 187, 193 (1976); Statutory Comment, *Take-Over Bids in Virginia*, 26 Wash. & Lee L.Rev. 323, 329 (1969).

[47]Idaho Code 30-1503(1).

[48]Idaho Code 30-1503(4).

[49]See, e. g., Senate Report at 4; Senate Hearings at 59 (Statement of Prof. Hayes); Aranow & Einhorn, *Tender Offers for Corporate Control* 223 (1973); Austin & Fishman, *Corporation in Conflict:*

other ways, as well. Idaho's regulation of defensive efforts by a target is significantly weaker than Idaho's regulation of an offeror's activities. *Compare* Idaho Code §§ 30-1504 and 30-1505, *with* Idaho Code 30-1503-06. Finally, the Idaho statute gives the target corporation board the power to exclude an offer from state regulation by approving the offer. Idaho Code 30-1501(5)(3).[50]

The district court concluded that these pro-management provisions evidenced a legislative purpose "to inhibit tender offers for the benefit of management". 439 F.Supp. at 437. *Accord,* Moylan, *State Regulation of Tender Offers,* 58 Marq.L.Rev. 687, 690 (1975). The district court further reasoned that this purpose conflicted with the Williams Act's purpose of protecting investors, and that this conflict meant the Williams Act preempted Idaho's statute. 439 F.Supp. at 437.

McEldowney strenuously objects to the district court's characterization of the purpose of the Idaho takeover law. He contends that Idaho, like Congress, legislated to protect investors. He explains the pro-management provisions not as an attempt to prevent tender offers, but as a means of involving the directors and officers of the target in the evaluation of a tender offer. With the advance warning

The Tender Offer 127 (1970); Langevoort, *State Tender-Offer Legislation: Interests, Effects, And Political Competency,* 62 Cornell L.Q. 213, 238 (1977); Wachtell, *Special Tender Offer Litigation Tactics,* 32 Bus.L. 1433, 1437-42; Wilner & Landy, *The Tender Trap: State Takeover Laws and Their Constitutionality,* 45 Fordham L. Rev. 1, 9 (1976).

[50]Among the restrictions imposed on target management by the federal law are Rule 13e-1, 17 C.F.R. § 240.13e-1 (1977), limiting the ability of a target corporation to repurchase its own shares during a tender offer, and Rule 14d-4, C.F.R. § 240.14d-4 (1977) imposing disclosure requirements on incumbent managers who wish to recommend that shareholders accept or reject a tender offer.

and additional time provided by the state law, so he argues, target directors have an opportunity to fulfill their fiduciary duties to shareholders by studying the offer and either negotiating better terms or making a recommendation based on the shareholders' interests. Appellant's Brief at 39-42. McEldowney also explains that management has the power to exclude an offer from Idaho regulation because presumably management will do so only when it already has had an opportunity to study the offer thoroughly and to negotiate fully a takeover. Appellant's Brief at 41.

We need not probe the minds of Idaho legislators to determine whether the true purpose of the Idaho takeover law was to protect investors or to protect incumbent management. Even if we accept the appellant's interpretation of the legislature's purpose, it is still true that Idaho chose to protect investors differently from the way Congress protected investors. Instead of relying upon *investors'* decisions after full disclosure, Idaho relies upon the business judgment of corporate directors with a fiduciary duty to their shareholders. Idaho's "fiduciary approach" to investor protection may be one way to protect shareholders, but it is an approach Congress rejected.[51]

[51]The appellant explains this rejection in part because there are no federal fiduciary standards for corporate directors and officers. Appellant's Brief at 39-40. *See also Santa Fe Indus., Inc. v. Green*, 1977, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480. This explanation is unsatisfactory. Congress could have relied upon state created fiduciary duties. Indeed, in this case Idaho would be relying upon fiduciary duties not created by her law, but by the law of the State of Washington.

In general, a state legislature may be entitled to assume that the directors and officials of a target company will honor their fiduciary obligations. It would not be surprising, however, if another legislative body declined to make the same assumption. To establish a claim under state law, a shareholder usually must overcome a presumption that directors act properly, and prove that they acted in self interest. Few plaintiffs have successfully met this burden. *See, e. g., Cheff v. Mathes*, Del., 1964, 41 Del.Ch. 494, 199 A.2d 548; *Kors v. Carey*, Del., 1960, 39 Del.Ch. 47, 158 A.2d 295. *See also* Senate Hearings at 121 (statement of Prof. Kaplan); Israels, *Corporate Purchases of Its Own Shares—Are There New Overtones?*, 50 Cornell L.Q. 620 (1965).

Idaho's statute is preempted, because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible. The Senator for whom the Williams Act is named has written, "[a]dvance notice provisions, and requirements concerning the duration of offers, the pro rata purchases of shares, and the withdrawal rights of shareholders either explicitly conflict with federal provisions on the same subjects or are obstacles to the accomplishment of objectives implicit in the federal statutes". H. Williams, *Introduction to Developments in Tender Offers for Corporate Control* xix (1977). Congress intended for the investor to evaluate a tender offer; Idaho asks the target company management to make that decision on behalf of the shareholders. *See generally* Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S.Cal.L.Rev. 1133, 1150 (1974). That Congress rejected provisions very similar to some of those in the Idaho takeover statute does not mean the state law is automatically preempted. *See, e.g., DeCanas v. Bica*, 1976, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43. In this situation, however, Congress rejected those provisions to preserve the neutral regulatory stance that gives each side of a tender offer an equal opportunity to persuade the investor. When Idaho enacted those rejected provisions it hampered an offeror's ability to express and explain its position directly to investors. In doing so, Idaho disrupted the neutrality indispensable for the proper operation of the federal mar-

ket approach to tender offers regulation.[52]. The Idaho takeover statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Williams Act.[53]

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[52]Changing economic conditions may have disrupted the balance that Congress struck in the Williams Act. But, it is for Congress—not Idaho—to determine if adjustments in the federal balance are necessary, and if so, what adjustments should be made.

[53]We are not persuaded by the appellant's argument that Idaho's takeover statute is analogous to the state laws governing internal corporate matters and fundamental corporate changes such as mergers, that traditionally have co-existed with federal securities regulation. First, the law of Washington governs the internal affairs of Sunshine, so even if this argument had validity it would not justify Idaho's regulation of the Great Western tender offer. *See, e. g.*, Langevoort, 62 Cornell L.Q. at 222-23. *Western Air Lines, Inc. v. Sobieski*, 1961, 191 Cal.App.2d 399, 12 Cal.Rptr. 719, does not strengthen Idaho's position. In *Western Air Lines* the court allowed California to assert some control over the internal affairs of a Delaware corporation. California had an unusually strong interest in the corporation, however, because over fifty percent of its shareholders were California citizens. *See* Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit*, 58 Colum.L.Rev. 1118, 1191-20 (1958). In contrast, only about two percent of Sunshine's shareholders live in Idaho.

Second, a tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself. The voting rights of shares and the legal relationship between a corporation and its shareholders does not change because of a tender offer. Although a tender offer can be a substitute for a proxy contest, there are important distinctions between the two. In a proxy contest the existing shareholder transfers only his vote; the other aspects of his existing relationship with the corporation remain. A tendering shareholder severs the existing relationship completely. Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal.L.Rev. 1133, 1154 (1974). *See also* Senate Hearings at 118 (statements of Prof. Mundheim and Prof. Kaplan). Statutes regulating the internal affairs of a corporation concern the existing relationship between a corporation and its shareholders. Since at the beginning of a tender offer the offeror may be a potential shareholder only, laws governing the offeror's conduct are not logically based on control of internal corporate affairs. Note, 47 S.Cal.L.Rev. at 1154. *See also* Wilner & Landy, 45 Fordham L.Rev. at 17; Aranow, Einhorn & Berlstein at 230.

The Idaho statute requires substantially more disclosure than the Wiliams Act. *Compare* Idaho Code § 30-1503(2) *with* Schedule 14D-1, 17 CFR 240 HD-100. In that respect, as the SEC points out, it also interferes with federal regulation. *See* SEC amicus brief at 41-42. McEldowney argues that Congress had the express desire to get information to investors. Idaho's more demanding disclosure requirements, he contends, only go further in the same direction, thereby carrying out rather than frustrating the purposes and objectives of Congress.

Superficially Idaho's extensive disclosure requirements appear compatible with a market approach to tender offer investor protection. In reality, in the area of financial disclosure it can be true that "less is more". Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures. Hearings on S.510 Before Subcommittee on Banking and Commerce, 90th Cong., 1st Sess. at 205 (1967) (Senate Hearings) (statement of Mr. Cohen); *Corporate Takeovers*, Hearings Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 90 (1976) (*Corporate Takeovers*) (statement of Mr. Loomis); Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 219-20 (1977). Management may also be able to halt an offer because some immaterial information required by excessive disclosure standards is missing or inaccurate. *See* Idaho Code § 30-1503; Aranow, Einhorn & Berlstein at 220. Those excessive requirements would cut off an offeror's opportunity to present the material information that investors need to make their decisions.

In § 13(d) of the Williams Act Congress delegated to the SEC the task of specifying what data is material to an investor considering a tender offer. The SEC has attempted to write disclosure requirements that provide enough material information without producing reports so detailed and complicated that few shareholders would want to read them. *See Corporate Takeovers* at 90 (statement of Mr. Loomis). That judgment is a legislative one. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 175, 83 S.Ct. 1210 (White, J., dissenting). Idaho's effort to second guess that judgment cannot stand. *Id.* This is particularly true because Idaho's additions to the federal disclosure requirements reduce the utility of federally required disclosure and produce an obstacle to the accomplishment of the federal objective to enable investors to make an informed choice about a tender offer.

V.

THE VALIDITY OF THE IDAHO TAKEOVER STATUTE UNDER THE COMMERCE CLAUSE

The commerce clause, U.S. Const., art. I, § 8, grants to Congress the power to regulate foreign and interstate commerce. This affirmative grant also imposes limits upon state power to regulate commerce over which Congress has primary responsibility. *See, e. g., The Great Atlantic and Pacific Tea Co. v. Cottrell*, 1976, 424 U.S. 366, 370-71, 96 S.Ct. 923, 47 L.Ed.2d 55. Nevertheless, not every exercise of state power with some impact on interstate commerce is invalid. "Rather, in areas where activities of legitimate local concern overlap with the national interests expressed

by the Commerce Clause—where local and national powers are concurrent—the Court in absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims' ". *Id., quoting H. P. Hood & Sons, Inc. v. DuMond*, 1949, 336 U.S. 525, 553, 69 S.Ct. 657, 93 L.Ed. 865 (Black, J., dissenting).

A. Congressional Permission

McEldowney contends that no adjustment of state and federal claims is necessary here because Congress consented in the 1934 Act to state takeover laws that might otherwise contravene the commerce clause. Congress has the power to give such consent and thereby to waive usual commerce clause restrictions. *E. g., Southern Pacific Co. v. Arizona*, 1944, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915. *See generally* P. Brest, *Processes of Constitutional Decisionmaking* 219-22 (1975); G. Gunther, *Cases and Materials on Constitutional Law* 367-71 (9th ed. 1975). To determine whether Congress has consented to state regulation of tender offers that interferes with interstate commerce we must examine again § 28 of the 1934 Act, 15 U.S.C. § 78bb (1970). This is the provision that the appellant reads to give such consent.

That examination convinces us that § 28 does not consent to otherwise invalid state laws. When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. *See, e. g.*, the Wilson Act of 1890, 26 Stat. 313. Congress has also stated that, in the absence of affirmative Congressional action, courts should impose no barriers on state

regulation. *See* the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 *et seq.* The language in § 28 of the 1934 Act is notably different from these acknowledged examples of Congressional consent. Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation.

The legislative history of § 28 demonstrates that even if we were to interpret § 28 to remove some commerce clause restrictions, that consent would not be broad enough to settle the commerce clause issue raised by the Idaho takeover law. The jurisdiction preserved in § 28 is that "of state security commissions to regulate transactions *within their own borders.*" H.R.Rep.No.85, 73d Cong., 1st Sess. 10 (1933) (emphasis added). *See also* Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L.Q. 213, 247 (1977). The Idaho takeover law, in contrast, controls transactions made throughout the world.

B. The Pike Test

Because Congress has not settled the commerce clause issues raised in this case, we must look to the numerous Supreme Court decisions on the commerce clause for guidance. Fortunately, the Court has recently undertaken a restatement and distillation of its cases. *See Dixie Dairy Co. v. City of Chicago*, 7 Cir. 1976, 538 F.2d 1303, 1308. In *Pike v. Bruce Church, Inc.*, 1970, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, a unanimous Court adopted the following statement of the law:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443, 4 L.Ed.2d 852, 856, 80 S.Ct. 813, 816 [78 A.L.R.2d 1294]. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local intent involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord, Raymond Motor Transportation, Inc. v. Rice, 1978, —— U.S. ——, 98 S.Ct. 787, 792-796, 54 L.Ed.2d 664; *A & P Tea Co. v. Cottrell*, 424 U.S. at 371-72, 96 S.Ct. 923.[54]

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[54] The appellant cites *Brotherhood of Locomotive Firemen v. Chicago, R. I. & P. R. Co.*, 1968, 393 U.S. 129, 89 S.Ct. 323, 21 L.Ed.2d 289, to support an argument that the *Pike* balancing analysis is not applicable to this case. Part of this argument is linked to the appellant's contention that in § 28 Congress consented to the Idaho statute. We have already rejected that contention. The appellant also argues against applying *Pike* because the analysis adopted in *Brotherhood* is more deferential to state law than the analysis enunciated in *Pike*. *Pike*, however, refines *Brotherhood*, not vice versa. *See Dixie Dairy Co. v. City of Chicago*, 7 Cir. 1976, 538 F.2d 1303, 1308. Moreover, commentators have pointed out that *Brotherhood* is, at least in part, inconsistent with other recent commerce clause decisions. *E. g.*, G. Gunther at 311. *Brotherhood* may still stand for the proposition that *Pike* balancing is inappropriate when the benefit of state legislation and the burden on interstate commerce are noncomparable. *See American Can Co. v. Oregon Liquor Control Commission*, Or.App. 1973, 517 P.2d 691; *Procter and Gamble Co. v. City of Chicago*, 7 Cir. 1975, 509 F.2d 69. *But see Dixie Dairy Co. v. City of Chicago*, 538 F.2d at 1308 (explaining *Procter and Gamble*). Any such principle is not relevant in this case because both the benefits of the regulation and the burden on commerce are economic.

1. Legitimate local purposes.

The district judge concluded that the immediate purpose of the Idaho takeover law is to protect incumbent management. The district judge further ruled that this purpose is not a legitimate one for state regulation and that no other legitimate local purpose for the Idaho law could be found. McEldowney strongly condemns these findings as a usurpation of the Idaho legislature's functions. We agree with him that at this stage of its analysis the district court too quickly dismissed possible legitimate local interests served by the Idaho takeover law.

It is true that the Idaho law helps incumbent management. One purpose of this favoritism may be to prevent the removal of local business to other states. This purpose would be unacceptable. Indeed, statutes *requiring* business operations to be performed in the home state that could more efficiently be performed elsewhere impose a burden on commerce that is *per se* illegal. *Pike v. Bruce Church, Inc.*, 397 U.S. at 145, 90 S.Ct. 844, 25 L.Ed.2d 174. Idaho's law does not require any business to remain in Idaho; at worst, it hinders relocation. Nevertheless, the purpose of preserving local industry cannot support the legislation. Nor can that effect be ignored.

McEldowney advances a different state interest in helping incumbent management. He points out that a corporation can influence local lifestyle through such means as charitable contributions or civil involvement and the depth of its commitment to issues such as pollution control or job safety. He contends that this interest is benevolent management is a legitimate reason for Idaho to regulate the means by which outsiders can change management. We accept this as a legitimate local interest.

McEldowney argues that the true purpose of the Idaho takeover statute is to protect investors. This is certainly a legitimate purpose. Since we are not concerned at this step of our analysis with the relationship between the legitimate purpose and the means of regulation, we also consider this interest. We note, however, that Idaho has little reason to protect shareholders of other states, if their securities transactions do not take place within that state or substantially affect Idaho shareholders. *See* Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Ford.L.Rev. 1, 17 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers,* 47 S.Cal.L.Rev. 1133, 1153 (1974). *See also Hall v. Geiger-Jones Co.,* 1917, 242 U.S. 539, 557-58, 37 S.Ct. 217, 61 L.Ed. 480, where the Court turned back a commerce clause challenge to Blue Sky laws in part because the laws regulate only transactions within the state. *Cf. Federal Securities Code* § 1904(c) (Proposed Official Draft 1978) which would preempt state regulation of tender offers unless the target has its principal place of business in the regulatory state and more than 50 percent of the record or beneficial holders of the target's outstanding voting securities holding more than 50 percent of those securities are residents of the regulatory state. In this case, only about two percent of Sunshine's shareholders reside in Idaho. That there are even that many is by chance. Idaho's law would have applied even if no shareholders had resided in Idaho and no securities transactions had taken place within Idaho. Moreover, the business realities of tender offers make it unlikely that there will be many offers for corporations held predominately by Idahoans (or citizens of any other narrow geographic area). Investment bankers

know that local owners are characteristically loyal to management. Therefore, corporations with widespread stock ownership are more promising tender offer targets. *See, e. g.,* Trough, *Characteristics of Target Companies,* 32 Bus. L. 1301, 1301-02 (1977).

2. Impact on interstate commerce.

Rather than establishing interference with commerce that occurred in connection with the Great Western offer for Sunshine, much of the evidence in this case consisted of disputed expert opinions about the general impact Idaho's law would be likely to have on the making of interstate offers and the functioning of national securities markets. One of the effects mentioned at trial is the disruption of the normal securities markets that state-mandated advance notification or announcement of an offer can cause.[55] Another is a change in strategy by offerors. For instance, an offeror anticipating a battle during the delay caused by a state law might deliberately make a low offer so that it can raise its offer to meet that of a competitor. There was also testimony that state statutes such as Idaho's have a general effect of discouraging tender offers. These effects—and others—have been identified by several commentators. *See, e. g.,* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 229-30 (1977); Moylan, *State Regulation of Tender*

[55]S. 510 originally included a procedure of confidential advance filings. Both the New York and American Stock Exchanges warned that the inevitable leaks that would result from the preparation of advance filings would disrupt the operation of the securities markets. *See* Senate Hearings at 72-73 (statement of Mr. Calvin), 98 (statement of Mr. Saul).

After hearing from the Exchanges, the Senate committee deleted the advance filing provision.

Offers, 58 Marq.L.Rev. 687, 691-92; Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Committee, American Bar Association, *State Takeover Statutes and the Williams Act* reprinted at 32 Bus.L. 187, 193 (1976); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Ford.L.Rev. 1, 10-11, 14, 20 (1976); Note, 47 S.Cal.L.Rev. at 1149-52; [1969] Sec.Reg. & L.Rep. (BNA), No. 1 at A11.

To some extent this evidentiary situation was unavoidable. State takeover laws can have numerous effects on a tender offeror's plans. It would be unusual for each of those effects to be felt in a single offer. Nevertheless, we would hesitate to agree with the district court that the evidence shows a substantial effect on interstate commerce if the record contained only speculation about the effect of Idaho's statute and of state takeover laws in general. The record contains more. Baptie's letter of March 21, 1977 delayed an interstate tender offer that would otherwise have gone forward.[56] That action in itself not only had a substantial impact on interstate commerce, it *stopped* over 31 million dollars of interstate commerce. An executive of Great Western testified that after Baptie's letter the company doubted it could ever satisfy Idaho's requirements. Tr. at 156.

In addition, except in the rare tender offer made entirely within Idaho, Idaho's extraterritorial approach to tender

[56]To obtain a preliminary injunction in its Williams Act suit against Great Western, Sunshine first was required to show irreparable injury. *Rondeau v. Mosinee Paper Corp.,* 1975, 422 U.S. 49, 95 S Ct. 2069, 45 L.Ed.2d 12. It failed to do so. *Sunshine Mining Co. v. Great Western United Corp.,* D.Id., 1977, [1977-1978] CCH Fed. Sec.L.Rep. ¶ 96,049.

offer regulation has an inherent impact on interstate commerce. Idaho's law is designed to alter the disclosure made in securities transactions between Idaho and another state, two other states, and even entirely within another state. Idaho's law can also change the time when, if ever, those non-Idaho securities sales will occur. *Cf. Southern Pacific Co. v. Arizona,* 325 U.S. at 773-75, 65 S.Ct. 1515 (state restriction of train lengths that, in practical effect, regulated the length of out-of-state trains).

Finally, Great Western introduced evidence that if New York had also asserted jurisdiction over the Sunshine offer its legal requirements would have contradicted Idaho's. According to George Boswell, Executive Vice-President of Great Western, Great Western was concerned that the advance publication of a tender offer required by Idaho law would violate New York's prohibition of publication. Tr. at 154. Another witness, Jeffrey B. Bartell, testified that it was "conceivable" that the advance publication required by Idaho could constitute an unregistered offering in another state. Tr. at 70. Mr. Bartell gave no specific examples.

This evidence is important because in cases where the rules of different states conflict, the Supreme Court has been severe in its scrutiny of state legislation. L. Tribe, *American Constitutional Law* 339 (1978). Although the potential for such conflict was once enough to trigger such scrutiny, recently the Court has required a showing of actual conflict. *Id.*; G. Gunther at 317-18. The evidence in this case falls somewhere in between. There is evidence that states have already passed contradictory laws, but the evidence is not overwhelming. The sole example of an ac-

tual conflict rests on the plaintiff's own conclusion that a conflict exists between New York and Idaho law. That conclusion, to our knowledge, has never been litigated and may be incorrect.[57] Moreover, since New York ultimately did not assert jurisdiction Great Western was never subjected to conflicting legal requirements. Nor was there evidence of any other offer actually subjected to conflicting state requirements. On the other hand, several commentators have examined the state takeover statutes and expressed a concern that they may be contradictory. *See, e. g.,* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporation Control* 228 (1977); ABA Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act* reprinted at 32 Bus.L. 186, 189, 193 (1976); *Corporate Takeovers,* Hearing before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 90 (1976) (statement of SEC Chairman Loomis).

The record before us may not warrant the harsh commerce clause scrutiny that follows a demonstration of actual conflict between state rules. The demonstrated concern that state laws may conflict, however, supports other testimony that state statutes such as Idaho's deter tender offers. At any rate, we conclude that evidence other than that concerning conflicting state rules supports the view that the Idaho statute has a substantial impact on interstate commerce for purposes of the *Pike* analysis.

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[57] Great Western apparently inferred a New York prohibition of advance publication from the New York statute's silence on the subject. *See generally* N.Y.Bus.Corp.L., art. 16, §§ 1600-13 (McKinney Supp.1976). An amendment to § 1602 of the New York statute eliminated a requirement that an offeror publish the terms of its proposed takeover bid. N.Y.Bus.Corp.L., art. 16, § 1602 at 69 (McKinney Supp.1976) (note on legislative history).

3. *The balance of the burden and the benefit.*

The final step under *Pike* is to determine whether the legitimate local purposes served by Idaho's takeover statute justify the law's substantial impact on interstate commerce. As with any balancing analysis, we must first determine what degree of judicial examination is appropriate. At one time the Supreme Court assumed a deferential stance in commerce clause cases. *See, e. g., South Carolina State Highway Department v. Barnwell Bros.,* 1938, 303 U.S. 177, 190-91, 58 S.Ct. 510, 82 L.Ed. 734. Since 1938, however, a more intensive inquiry into the reasonableness of state regulation has evolved. *See, e. g., Raymond Motor Transportation, Inc. v. Rice,* —— U.S. at ——, 98 S.Ct. at 794-795; *Bibb v. Navajo Freight Lines, Inc.,* 1959, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003; *Southern Pacific Co. v. Arizona,* 1945, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; G. Gunther at 308-11, 315. The Court has scrutinized the fit between the state's purpose and its regulation. It has also asked whether alternative means of achieving the purpose would impose fewer burdens on interstate commerce, in a manner similar to "least restrictive alternative" analysis. *See, e. g., Pike v. Bruce Church, Inc.,* 397 U.S. at 142, 90 S.Ct. 844.

These more recent cases require greater justification for a law challenged on commerce clause grounds than for one challenged as a violation of due process.[58] G. Gunther at 311. Thus, while we are far from eager to invalidate Idaho's takeover law, we are free to use a stricter standard

[58]One explanation of this heightened scrutiny is that those burdened by state legislation interfering with interstate commerce often had no role in the political process that produced the regulation. *See generally* L. Tribe, *American Constitutional Law* § 6-5 (1978).

than the "rational relationship" test of due process analysis. We are interested in the substantiality of both the local interest itself and the link between the interest and the Idaho takeover law. Finally, we note that the challenged regulations are not examples of the kind of safety regulations the Court has been particularly reluctant to strike down. *See, e. g., Pike v. Bruce Church, Inc.,* 397 U.S. at 143, 90 S.Ct. 844, quoting *Southern Pacific Co. v. Arizona,* 325 U.S. at 796, 65 S.Ct. 1515 (Douglas, J., dissenting).

One state interest to consider is that of protecting investors. The strength of this interest is substantially diluted because Idaho has little reason to protect the large majority of the shareholders affected by the takeover act. In addition, as the district court pointed out, the benefits to investors from the Idaho takeover statute are not certain. 439 F.Supp. at 439. McEldowney asserts that during the state imposed delay of a tender offer, the original offeror may be forced to raise the offer, or another more advantageous competing offer may be made. Nothing in the Idaho statute guarantees those benefits. Indeed, shareholders could be *harmed* by the delay if during the waiting period the offeror reduces the offer or abandons altogether a bid shareholders would want to accept if they had a chance. *See generally,* Langevoort, 62 Cornell L.Q. at 228.

The additional disclosure required by Idaho's statute may assist some shareholders. It may confuse others. Moreover, additional disclosure from the offeror is not likely to be of great use to a shareholder making economic judgments about the desirability of a tender offer. The key relationship is that between the price offered and the value

of the target under current management. *See* Brudney, *A Note on Chilling Tender Solicitations,* 21 Rutgers L.Rev. 609, 616-20 (1967). Incumbent management is more likely to possess information about the current value of the target than is the offeror. Langevoort, 62 Cornell L.Q. at 230.

Another interest asserted by the appellant is that of encouraging civic responsibility by the management of local corporations. No doubt this can be a substantial interest. We question, however, whether it is advanced more than incidentally by the statute challenged in this lawsuit. Surely it cannot be true that all incumbent managers are model corporate citizens or that all tender offerors are vandals. The record certainly contains no support for such a conclusion. Yet, the Idaho takeover statute imposes the same handicaps on all offerors and the same advantages on all incumbent managers.

There is, of course, some relation between the Idaho takeover law and the interest in responsible management. The increased disclosure required by state law might help interested shareholders to determine whether a tender offeror is civically responsible. But that information would be of no help if it is never disclosed because the burdensome state requirements discourage a responsible offeror from ever making an offer for an Idaho corporation. Nor would the state law help if civically irresponsible incumbents are able to force an offeror to abandon his bid by invoking time consuming hearing processes or litigating the adequacy of the immaterial disclosures required by the Idaho statute. Moreover, disclosure will not be an effective means of encouraging corporate civic responsibility if the shareholders concentrate more on the economics of an offer than

the civic attitudes of the offeror. This economic bias seems particularly likely when, as here, most of the shareholders are not Idahoans. *See generally,* Senate Hearings at 157 (statement of Mr. Schanch).

Idaho could encourage good corporate citizenship with legislation more focused on that purpose. Health and safety regulations can be enacted. Tax incentives can encourage charitable contributions. Programs to involve local businessmen in civic problems can be created. These approaches would be likely to have a more direct impact on corporate behavior than increased disclosure in tender offers. They would also impose a substantially smaller burden on interstate commerce than the Idaho takeover law.

Against this uncertain protection for the small percentage of Sunshine shareholders in whom Idaho has a substantial legitimate local interest, and the, at best, indirect and incidental preservation of corporate civic responsibility provided by fuller disclosure, we must weigh our conclusions about the impact of Idaho's takeover statute on interstate commerce. Idaho's extraterritorial regulation of tender offers interferes with securities transactions all over the country. In this case, Idaho's law halted over 31 million dollars of interstate commerce. In addition, Idaho's statute would have compelled a non-Idaho offeror to make burdensome disclosures beyond those required by federal law to Sunshine shareholders all over the world.[59]

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[59]For the reasons already discussed, we have also considered but given less weight to evidence that the Idaho law could interfere with the functioning of the national securities markets, could change the strategy of those contemplating a national tender offer, and could have a general deterrent effect on national tender offers.

We conclude that these burdens are disproportionate to the legitimate benefits the Idaho takeover law provides. This conclusion is strengthened because another effect—perhaps unintended—of the Idaho statute is to hinder the movement of local businesses to other states. As a result, we agree with the district court that the Idaho takeover law is invalid under the commerce clause.

VI.

THE FOURTEENTH AMENDMENT

Great Western's final attack on the Idaho takeover law is that it violates due process because it delegates the legislative power to invoke the state regulatory provisions to private parties—the target's board of directors—without setting sufficient standards for the exercise of that authority. Although this theory is included in Great Western's original complaint, it was not addressed in the district court's opinion and was not pressed during trial.

The anti-delegation doctrine reached its height in *Schechter Poultry Corp. v. United States*, 1935, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570. Since *Schechter* delegations to private parties may have been viewed with some suspicion but *Schechter* has spawned few progeny. *See* K. Davis, *Administrative Law Treatise* § 2.17 (1970 & 1976 Supp.); L. Tribe, *American Constitutional Law* § 5.17 (1978). The delegation of authority in Idaho's takeover law does not contravene what remains of the principle. The fiduciary duties owed by corporate directors to their shareholders provide sufficient standards for the exercise of delegated power. The fiduciary duties imposed on Sunshine's directors came from Washington, rather than

Idaho. Basic fiduciary duties are similar, however, in all the states and the Idaho legislature could legitimately rely upon those duties to guide target corporation directors.

VII.

CONCLUSION

The states have an important role in our system of securities regulation. We do not invalidate Idaho's attempt to supplement the Williams Act without careful consideration of all the arguments raised by the appellant and the amici. Nor are we unmindful that the state experiments with regulation can be as useful in the subject of securities as in other areas. *See New State Ice Co. v. Liebman*, 1932, 285 U.S. 262, 280, 52 S.Ct. 371, 76 L.Ed. 747 (Brandeis, J., dissenting). But, as Justice Brandeis pointed out, such experimentation should be "without risk to the rest of the country." *Id.* at 311, 52 S.Ct. at 387. The Idaho legislature, through its extraterritorial law, made the entire country its laboratory. The takeover statute had extensive, deliberate, and foreseeable effects on transactions having only a minimal connection with Idaho.

The judgment is AFFIRMED.

GODBOLD, Circuit Judge, dissenting in part and concurring in part:

I dissent from the majority's decision because the court lacks power to reach the merits. Though the court has subject-matter jurisdiction under the general jurisdiction statutes, the court lacks personal jurisdiction because service was not proper under the Texas long-arm statute.

As to the special jurisdictional provision of the Securities Exchange Act of 1934, § 27 does not apply to this action.

To facilitate comparison of my views with the majority's, I will follow the structure of the majority's opinion. I wish to stress, however, that the majority analyze jurisdiction and venue under two separate lines of statutory authority. One line is the general jurisdiction and venue statutes, the other the special jurisdictional provision of the Securities Exchange Act. Of course, jurisdiction need be present and venue proper under only one line of authority for the court to reach the merits, but it is necessary to keep the two lines of authority separate.

I. JURISDICTION

A. *Subject-matter jurisdiction under the general statutes.*

I agree that there is subject-matter jurisdiction. There is a federal question, there is diversity, and the amount in controversy exceeds $10,000.[1]

B. *Personal jurisdiction under the Texas long-arm statute.*

The federal rules authorize service "under the circumstances and in the manner" prescribed by the long-arm statute of the state in which the district court sits. Fed.R.Civ.P. 4(e); *see* Fed.R.Civ.P. 4(d)(7). The Texas long-arm statute provides for service on a nonresident natural person doing business in Texas in any action arising out of such business. Tex.Civ.Stat. art. 2031b § 2. "Doing business" is defined to include entering into a contract to be performed in whole or part in Texas or the commission of a tort in whole or part in Texas. *Id.* § 4. Courts have often characterized this statute as an effort by the Texas lawmakers to provide personal jurisdiction to the full extent due process allows. *E. g., Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228, 1234 (C.A.5, 1973).

[1] As I read the majority's opinion they do not reach the question whether 28 U.S.C. § 1337 would also confer subject-matter jurisdiction, and of course it is unnecessary to answer that question in this case.

The due process inquiry into personal jurisdiction is centrally concerned with the relationship among the defendant, the forum, and the litigation. *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683, 698 (1977). The interests of the forum state and of the plaintiff in the action's proceeding in that forum should be considered. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690, 56 L.Ed.2d 132, 141 (1978). But due process essentially requires that the defendant have such contacts with the forum state as make it reasonable, in the context of our federal system of government, to require the defendant to defend the particular suit brought here. Whether it is reasonable depends upon the nature and quality of the defendant's activity. *International Shoe Co. v. Washington,* 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95, 104 (1945). The activity must show that the defendant has purposefully availed himself of the benefits and protection of the forum state's laws. *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283, 1298 (1958).

In this case due process would not allow a Texas court to exercise personal jurisdiction over the defendant. First, the defendant has not purposefully availed himself of the benefits and protection of Texas law. Second, the defendant's only contacts with Texas are the effects of its regulation that were felt in Texas, and these effects are of a

different nature and more attenuated quality than will support personal jurisdiction. Third, the State of Texas lacks any interest in this action's proceeding in a Texas forum.

1. Benefits and protection of the forum state's laws.

Due process requires that the defendant have purposefully availed himself of the benefits and protection of Texas law. The majority speculate that this requirement should not be understood literally but assert that in any event the requirement has been met. I believe the requirement means what it says. And the majority's assertion that in any event the requirement has been met lacks substance.

Recent cases affirm the vitality of the requirement that the defendant have purposefully availed himself of the benefits and protection of the forum state's laws.[2] The majority argue the requirement means only that the plaintiff's unilateral activity is insufficient to support personal jurisdiction over the defendant. Certainly the requirement expresses this notion, *see Hanson v. Denckla,* 357 U.S. at 253, 78 S.Ct. at 1239, 2 L.Ed.2d at 1298, but the language of benefits and protection is not surplusage. Rather it

[2]We recently found no personal jurisdiction under the Texas long-arm statute in *Barnstone v. Congregation Am Echad,* 574 F.2d 286, p. 289 (C.A.5, 1978), because "the defendant has neither transacted any purposeful activity within the State of Texas nor has it invoked the benefits and protection of the laws of Texas . . . ." The Supreme Court, when it found no minimum contacts in *Shaffer v. Heitner,* 433 U.S. at 216, 97 S.Ct. at 2587, 53 L.Ed.2d at 705, specifically said the defendants in that case had not availed themselves of the privilege of conducting activities in Delaware in a way that would justify bringing them before a Delaware tribunal. Even more recently the Supreme Court concluded that the defendant in *Kulko* had not purposefully derived any benefit from any activities relating to the State of California which would justify that state's exercise of personal jurisdiction over him.

embodies the idea that it is in part the defendant's enjoyment of the benefits and protection of a state's laws that makes it fair to require the defendant to appear in the state's courts. *See International Shoe Co. v. Washington,* 326 U.S. at 319, 66 S.Ct. at 159, 90 L.Ed. at 103. The Supreme Court has treated the language of benefits and protection as a lateral requirement. For example, in *Kulko* the Court specifically examined whether the defendant had enjoyed the benefits and protection of the forum state's laws and found he had not. —— U.S. ——, 98 S.Ct. at 1698 & n. 7, 56 L.Ed.2d at 132 & n. 7.

The majority say that even if the requirement means what it says it has been met. In part they speculate:

> If Great Western had failed to comply with the Idaho takeover law, and the Idaho officials had obtained criminal sanctions, no doubt the state officials would have expected Texas to honor those criminal judgments.

But Idaho could not obtain criminal judgments without first obtaining personal jurisdiction over the criminal defendants, and once it had personal jurisdiction Idaho could enforce the judgments without Texas having to honor anything. At most Texas's cooperation would be limited to Idaho's seeking extradition of the criminal defendants under the United States Constitution, art. 4, § 2, cl. 2, on the ground they are "fugitives," or under the Uniform Criminal Extradition Act on the ground that, though not fugitives, the defendants are charged with committing an act "intentionally resulting in crime" in Idaho. Tex. Code Crim. Proc. art. 51.13 § 6. Perhaps this provision would apply to the hypothetical prosecution by Idaho. Nevertheless the possibility that sometime in the future a

state may seek extradition of criminal defendants does not cause officials of the putative demanding state to be at the present time purposefully availing themselves of the benefits and protection of the other state's laws.[3]

2. Nature and quality of defendant's contacts.

Due process requires that the nature and quality of defendant's contacts with the forum state be such that it is reasonable to require the defendant to defend that particular suit brought there. Because defendant has conducted no activities in Texas, defendant's only possible contacts are the effects of Idaho's regulation felt by Great Western in Texas. The Supreme Court's recent decision in *Kulko* is instructive. The state court had justified its exercise of jurisdiction over a nonresident defendant in an action for child support by relying on the defendant's having caused an effect in the state. This is similar to the majority's reliance upon the defendant's having caused an effect in Texas. In *Kulko* the Supreme Court concluded that jurisdiction based solely on causing an effect in the state was unreasonable where the cause of action arose from neither

[3]Moreover it seems incorrect to treat this wispy possibility as a jurisdictional factor. I think the majority recognize the insubstantiality of what they call a benefit. They suggest the benefit factor should be discounted when the "benefit" is attenuated and speculative (but without actually discounting the factor in this case). *See* note 28 to majority opinion. It is true the presence of a benefit alone does not satisfy the minimum-contacts test. Other criteria must be met as well. All the same, the "benefit" the majority see suggests that governors, state prosecutors, and state regulatory officials charged with enforcing state laws concerning a multitude of corporate activities are daily subjecting themselves to the reach of civil suits with long-arm service of process.

But cf. Maney v. Ratcliff, 399 F.Supp. 760 (E.D.Wis. 1975) (solicitation of arrest and representation that extradition would be sought held purposeful availing of the benefits of state law in § 1983 civil rights action).

the defendant's causing physical injury in the state nor his commercial transactions in interstate commerce.[4] The effect alone was an insufficient contact. Although *Kulko* itself dealt with a different factual setting, the reasoning in the opinion leads to the conclusion that in this case jurisdiction based solely on causing an effect is also unreasonable. As in *Kulko*, today's case concerns neither tortious conduct nor commercial transactions on the defendant's part.[5] Of course, the defendant's activity, whatever its situs, ultimately impacted on the plaintiff's commercial activity. Idaho's regulation affected Great Western's tender offer. But the due process issue turns on the nature and quality of the defendant's contacts in the forum, not the plaintiff's activity in the forum and elsewhere. Idaho's contacts in Texas have a different nature and a more attenuated quality than support jurisdiction under the minimum-contacts case law.[6]

[4]The Supreme Court recognized that the effects test the state court used was derived from the ALI's Restatement (Second) of Conflict of Laws § 37 (1971), which provides:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

[5]The majority's argument that "Idaho's 'business' is to regulate" confuses a pun with analysis. It is true that a state government may at times engage in commercial activities, but the regulatory activities involved in this case do not present such an instance and cannot be made such by a semantical device.

[6]To support the effects test they use the majority refer to two district court opinions, saying, "Personal jurisdiction has been found to exist over price fixing conspirators whose illegal activities in one state were designed to control prices in the forum state." *Hitt v. Nissan Motor Co.*, 399 F.Supp. 838 (S.D.Fla. 1975), *vacated on other grounds*, 552 F.2d 1088 (C.A.5, 1977), may not even hold what the majority read it to hold. Although the court noted that the

3. The state's interest.

The due process analysis should also consider the interest of the forum state. In this case Texas lacks any interest that would justify the exercise of its jurisdiction. The nature of defendant's conduct points to this problem. The Texas long-arm statute explicitly covers only tortious conduct and commercial transactions, and almost all the Fifth Circuit cases cited by the majority concern either tortious conduct or commercial transactions.[7] The state has a definite interest in tortious conduct because state law deems such conduct wrongful. The state also has an interest in commercial transactions because state law governs the transactions. But the state's interest in other nontortious conduct varies, *see* Restatement (Second) of Conflict of Laws §§ 36-37 (Comments), so it is necessary to find a

defendant "surely must have contemplated that any price-fixing it might have engaged in would have consequences extending into the forums," 399 F.Supp. at 848, the court also analogized price fixing to products liability and placed great weight on the defendant's causing products to be shipped to or sold by wholly owned subsidiaries in the forums. The court suggested that causing products to enter the stream of commerce might have been sufficient. In *Maricopa County v. American Petrofina, Inc.*, 322 F.Supp. 467 (N.D.Cal. 1971), the court said, without much analysis, that the price-fixing conspiracy created a destructive force which caused events and effects in the forum state. In both *Hitt* and *Maricopa* the courts explicitly or implicitly justified jurisdiction by the similarity they perceived between price fixing and tortious conduct. This justification does not extend to today's case: a suit to enjoin the enforcement of state regulation bears little resemblance to a damages action sounding in tort.

[7] *See Wilkerson v. Fortuna Corp.*, 554 F.2d 745 (C.A.5) (commercial tort), *cert. denied*, 434 U.S. 939, 98 S.Ct. 430, 54 L.Ed.2d 299 (1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (C.A.5, 1974) (commercial tort); *Jetco Electronic Indus., Inc. v. Gardiner*, 473 F.2d 1228 (C.A.5, 1973) (commercial activity); *Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723 (C.A.5, 1973); *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (C.A.5, 1969). The only possible exception is *Black v. Acme Markets, Inc.*, 564 F.2d 681 (C.A.5, 1977), an antitrust case.

particular basis in state law for the state's interest in exercising jurisdiction. *Compare Kulko, Part III.* In today's case there is no basis in state law that would give the state an interest in exercising jurisdiction.[8]

4. The majority's effects test.

Additionally I have difficulty with the majority's effects test. This test, as the majority articulate it, could apply broadly to many types of state regulation. I suggest this difficulty points to the inappropriateness of premising personal jurisdiction on the effects caused by state regulation.

The broad possible application of the majority's effects test is evident from an examination of other state regulation of corporate activities, such as qualification to do business, insurance regulation and Blue Sky laws. When a state engages in such regulation, another state will not have judicial jurisdiction over the regulating state's officials merely because the regulation causes, or can be expected to cause, extraterritorial effects. Yet these are examples of state regulations that require sometimes extensive or

[8] Texas may have a general interest in allowing its residents to use Texas courts in actions against nonresidents, but it is a weak interest because as a practical matter Great Western would not be precluded from bringing its action were the Texas courts unavailable. *See Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 n. 27 (C.A.5, 1974); *compare McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226 (1957).

Although Supreme Court cases leave no doubt that the factor of the state's interest should be included in the consideration of a state's exercise of judicial jurisdiction, some federal courts considering personal jurisdiction when service is made pursuant to a state's long-arm statute but under the federal rules have overlooked this factor. For example, several decisions have held that Fed.R.Civ.P. 4(e) is available even in cases exclusively within federal question jurisdiction, *see* 4 Wright & Miller, Federal Practice and Procedure: Civil § 1115 at 470 & n.9, even though the state's long-arm statute logically would not apply "under the circumstances" because the state would lack an interest to justify its exercise of jurisdiction.

burdensome compliance and apply to corporations that are often incorporated by other states, headquartered out of state, and owned by nonresidents. There are also abundant examples of state regulations that less directly regulate corporate activities yet have great extraterritorial effects. For example, California's strict requirements for automobile pollution devices have an immense (and foreseeable) impact on auto makers. But GM cannot sue the California regulators in Michigan simply because the California law has its effect there. Similarly, state laws regulating many phases of commerce will often be directed primarily at out-of-state corporations and thus have extraterritorial effects. Food purity laws are one example. Yet the extraterritorial effects are insufficient to support personal jurisdiction over those state officials charged with enforcing the law.

The majority leave unclear what is the exact effects test that they use. They stress that Idaho's regulation foreseeably caused effects in Texas.[9] The effects they specify were Great Western's efforts to comply with the regulation and the restraint of Great Western from its plan. But the majority recede from a test of foreseeably causing effects. They emphasize that "the crucial conclusion . . . is not that the actions of the Idaho defendant under the Idaho takeover law had a 'practical effect' in Texas, but that they

[9]A good exposition of a general effects test is Restatement (Second) Conflict of Laws § 37. Although § 37 as formulated does not contain a foreseeability element, the official caveat notes that a state can seldom exercise judicial jurisdiction over an individual who causes effects in a state by an act done elsewhere when those effects were not foreseeable. Section 37, however, does not support the majority's position, Rather, § 37 notes the constitutional requirement that the nature of the individual's contacts with the state must be such that the exercise of jurisdiction is reasonable, a requirement that is not met in this case.

amounted to the regulation of Great Western's Texas-based business activities."

If this is the majority's test, then the examples I have given above could also be said to amount to the regulation of business activities based out of state. The majority suggest the examples can be distinguished away because of what they term "the concededly unique characteristics of state takeover laws such as Idaho's." They say, "In none of the examples . . . is there a comparable lack of *any* connection between all parties to a transaction, as well as the transaction itself, and the regulating state." To the contrary, Idaho's statute—and state takeover laws such as Idaho's—do indeed have *some* connection, possibly very substantial connection, with what they seek to regulate. First, the state will have a connection with some of the offerees, and not as a fortuity. It is reasonable to expect that many possible target companies covered by state takeover laws are held partially or largely by in-state shareholders. Second, the state has a connection to the transaction itself because the transaction in securities is ultimately one involving the target company's business and properties.

It is difficult to separate the majority's jurisdictional test from a substantive inquiry into the reasonableness of the statute. The only tenable distinction between state takeover laws such as Idaho's and the examples of other state regulations having extraterritorial effects depends entirely on an anticipation of the majority's Commerce Clause holding, namely, that these statutes are invalid under the Commerce Clause. *See* note 37 to the majority opinion.

C. *Subject-matter jurisdiction under the Securities Exchange Act.*

Subject-matter jurisdiction under the Securities Exchange Act requires that a plaintiff's action be brought either to enforce a liability or duty created by the Act or to enjoin a violation of the Act.[10] In this case subject-matter jurisdiction is lacking because plaintiff's action concerns none of these things.

The majority conclude that § 28(a) impliedly prohibits a state official from enforcing a statute that conflicts with the 1934 Act. This is a dubious reading of § 28(a), which simply says,

> . . . Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

15 U.S.C. § 78bb(a) (1970). Section 28(a) immediately follows § 27's grant of exclusive jurisdiction. On its face § 28(a) provides that a state securities commission's jurisdiction is unaffected by the grant of exclusive jurisdiction.[11] The proviso guards against the section's being read too broadly—federal law will still preempt conflicting state law. But this proviso does not impose a liability for the enactment or enforcement of preempted state law, it does not create a duty to refrain from such conduct, and it does not make such conduct a violation of the Act. Certainly it does not do so expressly, and the majority recognize as much.

Section 28(a) also does not impliedly impose a liability, create duty or define a violation, at least not in any sense that § 27 comprehends. Section 28(a), like the sections with which it is grouped, does not effect any positive regulation. It creates neither rights nor remedies. State legislation and regulation can of course be invalidated on Supremacy Clause grounds, but § 27's conferral of subject-matter

[10] Subject-matter jurisdiction and venue under the Securities Exchange Act of 1934 are both controlled by § 27, 15 U.S.C. § 78aa (1970), which provides:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

The reference to criminal proceedings suggests that the violation must be a criminal violation, but I agree with the majority that violation may also refer to a civil violation. Additional support for this conclusion may be found in *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195, 204 (C.A.5, 1960), *cert. denied*, 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1961), where we said that a civil action could be maintained under § 27 even "in circumstances where a criminal proceeding would fail."

[11] The Securities Act of 1933, 15 U.S.C. § 77r, the Public Utility Holding Company Act of 1955, 15 U.S.C. § 79u, the Trust Indenture Act of 1939, 15 U.S.C. § 79u, the Trust Indenture Act of 1939, 15 U.S.C. § 77zzz, and the Investment Company Act of 1940, 15 U.S.C. § 80a-49, contain similar provisions. Only the Securities Act of 1933's provision does not include a proviso similar to "insofar as such jurisdiction does not conflict with any provision of this chapter," but it has been so construed. *Travelers Health Assn v. Commonwealth*, 188 Va. 877, 895-897, 51 S.E.2d 263, 271 (Va.1949), *aff'd*, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950).

jurisdiction simply does not encompass Supremacy Clause cases.

The majority point to § 16(b) cases to show that a violation for the purposes of § 27 need not be a criminal violation. I agree that § 27 may include civil violations. *See* note 10 *supra*. The majority's example also provides a useful counterpoint to this case to show what is an implied violation in the sense that § 27 comprehends. As the majority note, the Securities Exchange Act does not directly forbid short-swing trading by insiders. But the Act expressly creates a right in a corporation to recover any profit realized by an insider's short-swing trading in the corporation's stock. 15 U.S.C. § 78p(b) (1970). The implied violation is derived from this positive regulation. The insider's liability is simply the other side of the right created in the corporation by the profit recapture provision.

D. *Personal jurisdiction under § 27.*

Section 27 provides for nationwide service: "[P]rocess in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

I agree with the majority that if service were proper under the Texas long-arm statute, personal jurisdiction was of course obtained for the purposes of § 27. But if, as I have concluded,[12] the reach of the long-arm statute does not extend to grasp the defendant in this case, two unresolved questions would have to be reached: First, was the manner

[12]*See* part IB *supra*.

of service proper under the federal rules?[13] Second, was the extradistrict service consistent with due process?[14] Because I conclude that in today's case § 27 does not confer subject-matter jurisdiction,[15] I see no need to answer these controversial questions.

II. VENUE

A. *Venue under § 27.*

Section 27 provides for venue in any district wherein any act or transaction constituting the violation occurred or in the district wherein the defendant is found or is an inhabitant or transacts business.[16] Because the Northern District of Texas is not a district where the defendant is found, is an inhabitant or does business, venue will be proper only if an act or transaction constituting the violation occurred in the district.[17] The majority conclude that the "restraining effect" of Idaho's regulatory activities was a venue-conferring act. This hasty equation of effect with act deserves greater scrutiny.

[13]Because § 27 authorizes nationwide service but does not prescribe the manner of service, Fed.R.Civ.P. 4(e) might be read to allow the Texas long-arm statute to provide the *manner* of service, even though the statute would not provide for service under the same *circumstances*. *See Black v. Acme Markets, Inc.*, 564 F.2d 681 (C.A.5, 1977) (dictum). *But see Hilgeman v. National Insurance Co. of America*, 547 F.2d 298 (C.A.5, 1977).

[14]Although some courts have required minimum contacts with the forum district, arguably the due process concerns raised when a state exercises extraterritorial jurisdiction have no application to a federal court's exercise of extradistrict jurisdiction when a federal statute authorizes nationwide service. *See, e. g., Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (C.A.2, 1974).

[15]*See* part IC *supra*.

[16]Section 27 is quoted in full at note 7 *supra*.

[17]As I have already pointed out, *see* note 7 *supra*. I agree with the majority that the statutory violation need not be a criminal violation, even though § 27 suggests otherwise.

The only case I find which directly supports the theory that an effect may be an act under § 27's language is *Travis v. Anthes Imperial Limited,* 473 F.2d 515, 528-29 (C.A.8, 1973). One claim in that case dealt with conduct occurring in Canada that the court said had a foreseeable effect in the United States. The court first determined that the foreseeable effect was sufficient to make the exercise of jurisdiction reasonable. The court then determined that venue for this claim "lies in the [forum] district because [there] is where the consequences of the Canadian action were felt and where some acts and transactions constituting the violation occurred." Because the court found not only effects but acts and transactions in the forum district,[18] its reference to effects was an unnecessary makeweight. The case is at best weak authority for the majority's theory.

Many cases have held venue proper in situations where the defendant had never physically been in the forum district. Because the possibility of venue under such circumstances is broadly supportive of the majority's conclusion, the cases warrant investigation. In *Hooper v. Mountain States Securities Corp., supra* note 10, we held that defendant's telephone call, which plaintiff received in the forum district, followed by plaintiff's transfer of funds from the same district, made venue proper. Similarly, in *Hilgeman v. National Insurance Co. of America, supra* note 13, we held that venue was proper in the forum district when the defendant sent a premium notice by mail to the district and plaintiff paid by a check drawn in the district. Decisions by

[18]The court situated the acts by relying on the rule, discussed in the next paragraph, that interstate communications occur in both the place of sending and the place of receipt. *See* 473 F.2d at 524 n. 16.

other courts are similar. For example, venue has been held proper in the district where a fraudulent press release was transmitted, *Texas Gulf Sulphur Co. v. Ritter,* 371 F.2d 145 (C.A.10, 1967) (when followed by plaintiff's sale of stock through a broker in the district), and the district where allegedly false proxy material was mailed to a shareholder, *Mayer v. Development Co. of America,* 396 F.Supp. 917 (D.Del.1975).[19] Though these cases at first blush seem helpful to the majority's position, closer examination shows that they do not support a construction of § 27 that reads act to mean effect. All the cases can be confined to the rule they purport to apply—namely, the transmission or reception of any interstate communication supports venue in the forum district. The majority's view of today's case falls outside the rule these cases have applied. The effect felt because of regulatory activities is entirely different from the reception of an interstate transmission.

Another case finding venue proper when the defendant had never physically been in the forum district involved a failure to timely file a report required by federal law. *Investors Funding Corp. of New York v. Jones,* 161 U.S.App. D.C. 420, 495 F.2d 1000 (1974). The court, relying on analogous cases outside securities law, held that venue was properly laid in the district where the report was required to be filed. The rationale developed by the court was closely

[19]*See Sarratt v. Walker,* 405 F.Supp. 132 (D.S.C.1972) (mailing financial statement and solicitation); *Stern v. Gobeloff,* 332 F.Supp. 909 (D.Md.1971) (telephone solicitation); *Oxford First Corp. v. PNC Liquidating Corp.,* 372 F.Supp. 191 (E.D.Pa. 1974) (transmission of false information); *Prettner v. Aston,* 339 F.Supp. 273 (D.Del.1972) (solicitation of proxies by mail); *Schneider v. Sears,* 265 F.Supp. 257 (S.D.N.Y. 1967) (dissemination of allegedly false financial reports).

tied to the mechanics of filing, so this case also offers no effective support for the majority's theory.

In sum, though venue under § 27 has in some circumstances been held proper even when the defendant had never physically been in the forum district, the cases construing § 27 do not support the majority's approach of regarding conduct elsewhere as occurring where it has an effect.

The majority alternatively note that "Idaho officials sent at least one interstate letter into Texas as part of their regulatory efforts." The letter was signed by Melvin Baptie, Deputy Administrator-Securities of the State of Idaho's Department of Finance and an assistant of defendant McEldowney, Director of the Department of Finance. The letter was a nontrivial part of Idaho's enforcement of its statute. Thus, if § 27 were to confer subject-matter jurisdiction, I would agree that venue is proper under the rule we have followed in *Hooper* and *Hilgeman*.

B. *Venue under the general venue statute.*

The applicable general venue statute, 28 U.S.C. § 1391(b), provides that venue is proper "only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." I agree with the majority that the claim arose in the Northern District of Texas.

The provision for venue where the claim arose serves two possible purposes. The provision ensures that in multiple-defendant actions venue will always be proper in at least one district. *See Brunette Machine Works, Ltd. v.*

Kockum Industries, Inc., 406 U.S. 706, 710 n. 8, 92 S.Ct. 1936, 1939, 32 L.Ed.2d 428, 431 n. 8 (1972). Also the provision will sometimes provide a forum that is more convenient for litigants and witnesses. *See* 1966 U.S.Code Cong. & Admin. News p. 3694.

The place where the claim arose need not be the same as the place of the defendant's conduct. The venue provision replaced an earlier provision allowing a civil action for many automobile-related tort claims to be brought where "the act or omission complained of occurred." 28 U.S.C. § 1391(f) (repealed 1966). The new provision's different language evidences a congressional understanding that the place where the claim arose may be different than the place of the conduct.

There is room for disagreement whether it is better to apply a place-of-injury test, such as courts have tended to use with tort claims[20] and the majority apparently use in today's case,[21] or a weight-of-the-contacts test, such as

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[20] *E. g., McCrory Corp. v. Cloth World, Inc.*, 378 F.Supp. 322, 325 (S.D.N.Y.1974); *Chance v. E. I. DuPont de Nemours & Co., Inc.*, 371 F.Supp. 439, 450 (E.D.N.Y.1974); *see Walker v. Kawasaki Motors Corp.*, 62 F.R.D. 607, 611 (E.D.Tenn.1973).

[21] The majority say:

> "The core of Great Western's claim is that the Idaho officials invalidly prevented Great Western from initiating a tender offer for Sunshine. The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint . . . occurred, that place is Dallas."

See also majority opinion at note 31. I interpret the majority's position to be that the claim arose where the effects were felt.

The concept of effects—that is, the effects of Idaho's regulation—is critical to nearly every step of the majority's analysis. They find personal jurisdiction under the Texas long-arm statute because of foreseeable effects on business activities in Texas. They find venue under § 27 because they regard the restraining effect of Idaho's regulation as an act in Texas. And they find venue under § 1391(b)

courts have preferred in more complex cases.[22] Because the alleged injury was felt in several places—both by the offeror and the many offerees—the place-of-injury test is inexact. I would prefer the weight-of-the-contacts test, but either test, when applied in light of the statutory purposes

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because they view the restraining effect as giving rise to the claim. It may be helpful to sort out the differences among these various effects tests. The personal jurisdiction effects test of course has an element of foreseeability and is limited to the regulation of business in Texas. The other effects tests lack similar qualifications. The § 1391(b) effects test requires Texas to be where the effects were primarily felt, because the majority follow the orthodox position that a claim arises in only one district (despite their criticism of this position). For the personal jurisdiction effects test and the § 27 effects test, it matters not whether the effects were primarily in Texas or the Northern District of Texas. It is enough that some effects were felt there.

[22]Antitrust cases applying this test include *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F.Supp. 252, 260-61 (E.D.Pa. 1968); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1053, 1056 (E.D.Pa.1969); *Ghazoul v. International Management Services, Inc.*, 398 F.Supp. 307, 314-15 (S.D.N.Y.1975); *U. S. Dental Inst. v. American Ass'n of Orthodontists*, 396 F.Supp. 565, 574 (N.D. Ill.1975); *Redmond v. Atlantic Coast Football League*, 359 F.Supp. 666, 669-70 (S.D.Ind.1973); *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F.Supp. 812, 815-16 (E.D.Pa.1972); *California Clippers, Inc. v. U. S. Soccer Football Ass'n*, 314 F.Supp. 1057, 1062-63 (N.D.Cal.1970); *ABC Great States, Inc. v. Globe Ticket Co.*, 310 F.Supp. 739, 742-43 (N.D.Ill.1970); *Goggi Corp. v. Outboard Marine Corp.*, 422 F.Supp. 361 (S.D.N.Y.1976); *Grappone, Inc. v. Subaru of America, Inc.*, 403 F.Supp. 123 (D.N.H.1975). *But see Albert Levine Assocs. v. Bertoni & Cotti*, 314 F.Supp. 169, 170-71 (S.D.N.Y.1970) (place of injury). Cases in other fields applying the test include *B. J. McAdams, Inc. v. Boggs*, 426 F.Supp. 1091, 1103 (E.D.Pa.1977) (breach of fiduciary duty); *Kipperman v. McCone*, 422 F.Supp. 860 (N.D.Cal.1976) (violation of constitutional right); *Honda Assocs., Inc. v. Nozawa Trading, Inc.*, 374 F.Supp. 886, 891-92 (S.D.N.Y.1974) (trademark infringement); *British-American Ins. Co. Ltd. v. Lee*, 403 F.Supp. 31 (D.Del.1975) (securities law); *Weil v. New York State Dept. of Transp.*, 400 F.Supp. 1364, 1365 (S.D.N.Y.1975) (civil rights); *Idaho Potato Comm'n v. Washington Potato Comm'n*, 410 F.Supp. 171, 175-76 (D.Idaho 1976) (trademark infringement and unfair competition). *But see Iranian Shipping Lines, S.A. v. Moraites*, 377 F.Supp. 644, 648 (S.D.N.Y.1974) (Securities case using place-of-injury test).

of facilitating multiple-defendant suits and promoting litigational convenience, establishes that venue was proper in the Northern District of Texas.

III. MERITS

Should jurisdiction exist and venue be proper, I would agree with the majority that Idaho's takeover statute is preempted by federal law. Although the Williams Act does not expressly preempt state law, the Act regulates tender offers through a policy of deliberate neutrality among takeover contestants. The Idaho statute increases the target company's ability to resist an undesired takeover and thus upsets the careful balance struck by Congress. I would agree also that the statute is invalid under the Commerce Clause because the burden on interstate commerce exceeds the legitimate local interest served by the statute.[23]

IV.

Whether the Williams Act preempts state law and whether state takeover statutes may be invalid under the Commerce Clause are important national issues not pre-

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[23]To touch the rest of the bases, I agree with the majority that the issues presented by this case are not moot. And at first glance I would agree that *Ex parte Young* does not preclude the suit's being brought outside Idaho. That landmark decision established simply that a state officer can be sued to enjoin his enforcement of state law and did not speak at all to the forum in which he can be sued. Indeed, the opinion suggests that the officer can be sued in any court "having jurisdiction, Federal or state," 209 U.S. at 165, 28 S.Ct. 441, 456, 52 L.Ed. at 731, and the logic of the opinion implies as much. On closer examination the problem is less simple. The majority premise jurisdiction in the federal district court on their conclusion that the action could have been brought in a Texas state court. The possibility of one state court passing judgment on another state's laws may reach the boundary where the doctrine of *Ex parte Young* is overshadowed by the policies of the Eleventh Amendment.

viously decided by a court of appeals. But the sweep of federal jurisdiction and venue are also important, in the long haul perhaps more important. Jurisdiction and venue in the Northern District of Texas have been dubious, and fought over, in this case from the beginning. These threshold issues should not be submerged in this court in a rush to the merits, by the confecting of new and strained theories of jurisdiction and venue that will create new and vexing national and state problems and diminish the strength of the merits decision. I respectfully dissent.

Civ. A. No. CA-3-77-0405-D.

United States District Court,
N. D. Texas,
Dallas Division.

Sept. 2, 1977.

Great Western United Corporation,
Plaintiff,

v.

Wayne L. Kidwell, Attorney General of Idaho, Tom D. McEldowney, Director of the Idaho Department of Finance, Louis J. Lefkowitz, Attorney General of New York, Francis B. Burch, Attorney General of Maryland, and Norman Polovoy, Commissioner of Securities, Maryland Division of Securities,
Defendants.

MEMORANDUM OPINION

ROBERT M. HILL, District Judge.

In this case plaintiff challenges the constitutionality of the statutes of the states of Idaho, New York and Maryland which seek to regulate tender offers when the subject of the tender (called the target company) has one of various nexus with the states. These are commonly called "takeover" statutes. Plaintiff contends the takeover statutes are preempted by the Williams Act, the federal statute which controls tender offers, and are also violative of the Com-

merce Clause of the United States Constitution. For the reasons set forth below, the court does not reach the merits of plaintiff's case against New York and Maryland, but finds that the takeover statute of the State of Idaho is preempted and violates the Constitution.

I. Facts

Great Western's United Corporation (Great Western) is a publicly owned Delaware corporation with its principal executive offices located in Dallas, Texas. The principal officers, all directors, and the controlling shareholders of Great Western—W. Herbert Hunt and Nelson Bunker Hunt—reside in Dallas. Great Western's stock is listed on the New York Stock Exchange and the Pacific Stock Exchange.

Sunshine Mining Company (Sunshine) is a publicly owned corporation organized under the laws of the State of Washington. The corporate headquarters, employing about fifteen people in corporate functions, is located in Idaho. Sunshine also owns mining and milling operations in Idaho which constitute over fifty percent of its corporate assets. Sunshine wholly owns its subsidiary, Anchor Post Products, Inc., of Delaware (Anchor Post), which in turn owns subsidiaries incorporated in Florida, Texas,[1] Arkansas and California. Anchor Post's manufacturing facilities are based in Maryland. Sunshine further has significant business activities in New York which make application of the New York takeover law arguable. Sunshine's shareholders are fairly well distributed across the United States.[2] At least 489 individual shareholders of Sunshine reside in

[1]Property in Texas includes a manufacturing plant and a warehouse.

[2]Plaintiff's Exhibit M 1.

Texas, and this figure does not include those shares held in street name.

Hecla Mining Company (Hecla) and Silver Dollar Mining Company (Silver Dollar) have non-operating interests in the Sunshine mine in Idaho. In December, 1976, Hecla and Silver Dollar underwrote a proxy fight to oust the present management of Sunshine. In February, 1977, Great Western representatives met with Hecla and Silver Dollar to discuss Great Western's interest in purchasing shares of Sunshine. On March 18, 1977, Great Western announced its agreement to purchase a total of 335,070 shares of Sunshine from Hecla and Silver Dollar. This purchase represents about 6% of Sunshine's outstanding shares. Great Western also agreed that if it were successful in gaining control of Sunshine, it would reimburse Hecla and Silver Dollar for their proxy fight expenses up to $200,000.

On March 21, 1977, Great Western filed a Schedule 13D Statement with the Securities and Exchange Commission pursuant to the Williams Act Amendments to the Securities Exchange Act of 1934, 15 U.S.C. § 78m(b)-(e), 78m (d)-(f)(1970). This same day Great Western publicly announced its intention to make a tender offer for 2,000,000 additional shares of Sunshine (approximately 35% of Sunshine's outstanding shares) at $15.75 per share.[3]

Also on March 21, Great Western contacted through its attorneys the three states whose state officials are named defendants in this lawsuit: Idaho, New York and Maryland.

[3]This was Great Western's "unfriendly" offer. The Sunshine board of directors had the day before refused, under the time constraints placed upon it, to recommend to the shareholders Great Western's "friendly offer," a tender offer at $16.75 per share.

Great Western had evidently concluded that Idaho would certainly assert jurisdiction under its state takeover law but that New York and Maryland might be persuaded not to do so. It accordingly filed an application for registration under the Idaho takeover law and tried to draw indications from the Attorney General of New York and Commissioner of Securities of Maryland that they would not assert jurisdiction.

On March 25, 1977, Great Western received a telecopied letter from the Deputy Administrator of Securities of the Idaho Department of Finance, Melvin J. Baptie, indicating that he found Great Western's disclosures inadequate and that the twenty day time period for a hearing, provided by the Idaho takeover statute, Idaho Code § 30-1503(5), would not start to run until a complete statement was received, completeness to be determined by the Idaho Department of Finance.[4] Tom McEldowney, the Idaho Director of Finance, simultaneously entered an administrative order delaying the date of Great Western's tender offer.

In New York and Maryland, Great Western was faring little better. Great Western's counsel in New York were advised by the office of the Attorney General that New York was "leaning" toward asserting jurisdiction over the tender offer under its takeover law. In Maryland, counsel for

[4]Although Baptie's demands for information considerably exceeded his earlier indications to Great Western that the Schedule 13D information would more or less suffice, there is absolutely no reason to imply any bad faith on Bapties part. This case presented the first filing under the Idaho takeover law, TRO tr. at 24, and some inconsistency and scrupulousness in administering the statute were predictable. The court specifically finds that Baptie did not write the letter of comment with assistance from or solicitude for Sunshine. Great Western never called Baptie back after receipt of the letter to see if any of his comments were negotiable.

Great Western were informed that Maryland would not comment on the applicability of its takeover laws without a hearing.

On March 28, 1977, because of uncertainty as to when, if ever, the tender offer might go forward, Great Western filed this suit in the Northern District of Texas, Dallas Division, for declaratory and injunctive relief against the state officials of Idaho, New York and Maryland from enforcing the takeover laws of their respective states. Great Western urges in its suit that the state takeover laws violate the Commerce Clause of the United States Constitution and are preempted by the Williams Act.

Besides denying liability on the merits, defendants raised a panoply of defenses in avoidance of Great Western's suit. In their answer, they contended that Great Western lacked standing to bring this action, that the court lacked subject matter jurisdiction and personal jurisdiction over the defendants, that defendants are immune from suit under the doctrine of sovereign immunity, that venue is improper in this district and that service of process is insufficient.

On April 8, 1977, the court held a hearing on jurisdiction and venue. On April 21, 1977, the court entered unpublished findings of fact and conclusions of law holding that Maryland should be dismissed because Great Western had no dispute with Maryland and therefore lacked standing to sue the State. The court also held that jurisdiction and venue existed against the States of Idaho and New York under the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

Thereafter, the State of New York attempted to take an uncertified appeal to the United States Court of Appeals for

the Fifth Circuit which was dismissed on May 16, 1977. On May 23, 1977, a bench trial was held on the merits against New York and Idaho.

The court is of the opinion that Great Western's suit against the State of New York should be dismissed for mootness because New York no longer seeks to enforce its takeover statute against Great Western. The court is further of the opinion that jurisdiction, venue and service are proper against the State of Idaho and that the Idaho takeover statute violates the Commerce Clause, is preempted by the Williams Act and should be enjoined from enforcement. The court's rationale on the issues raised at the jurisdiction and venue hearing and at the merits hearing follows.

II. Standing

The defendants first argue that Great Western lacks standing to bring this suit against them. For the reasons set forth below, the court concludes that Great Western lacks standing against the State of Maryland but has standing against the States of Idaho and New York.

The concept of standing is based on the Article III requirement of the United States Constitution that restricts federal judicial power to "case and controversies." Through case law, standing has evolved into a rule of judicial self-restraint. *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

As articulated by the United States Supreme Court, Great Western must meet two standing requirements. First, Great Western must prove an injury in fact, a concrete interest in the outcome of the suit, sufficient to render the

matter a case or controversy subject to a federal court's Article III jurisdiction. Second, Great Western must be a proper proponent of the legal rights it seeks to enforce and within the "zone of interest" sought to be protected. *Singelton v. Wulff,* 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826, 832 (1976); *Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970). These will be discussed in reverse order.

A. *The "Zone of Interest" Test.*

In order to meet standing requirements, Great Western must first show that the interest sought to be protected by the complainants is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service Organizations v. Camp, supra.* The court is of the opinion that tender offerors are within the zone of interests protected by the Williams Act and that *Piper v. Chris-Craft Industries,* 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), does not compel a contrary result.

There is no question that the raison d'etre of the Williams Act is protection of shareholders. See *Piper v. Chris-Craft,* 430 U.S. at 26-29, 97 S.Ct. at 942-943, 51 L.Ed.2d at 144-145. But in implementing this policy, Congress placed special emphasis on even-handedness in the treatment of the target's management and the tender offeror. *Id.* at 29-33, 97 S.Ct. at 943-5, 51 L.Ed.2d at 146-7. Senator Williams himself stated:

> This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholder and employee, and in a few severe situations it may be necessary if the company is to survive.

> I have taken extreme care with this legislation to balance the scales equally to protect the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror.
> 113 Cong.Rec. 854 (1967)

This Congressional policy of even-handedness between management and offeror is sufficient to satisfy the zone of interest test of *Data Processing*.

Furthermore, while the Williams Act was created to protect shareholders from unscrupulous tender offerors, the legislation attempts to harness the tender offer as a pugilistic device for maximally advancing the interests of the shareholders. If Congress intended to encourage management and offerors to thrash it out for the benefit of the shareholders, it would be strange to deny the combatants any implicit interest in the procedures to be followed.

Although *Piper v. Chris-Craft* contains some broad statements to the effect that tender offerors were not intended beneficiaries of the Williams Act, the Court was at all times speaking in regard to interests in monetary damages under the Williams Act. The court ultimately concluded that implying a cause of action under the Williams Act for damages on behalf of the tender offeror would injure the very class for which the legislation was enacted. Damages against the target are damages against the shareholders. The Court specifically withheld judgment on the tender offeror's standing to sue for relief other than damages. 430 U.S. at 430-432, 97 S.Ct. at 949, 51 L.Ed.2d at 153 n. 28. This court is therefore free to hold that the Con-

gressional policy of even-handedness is probative of its intent to grant standing to tender offerors and target management for declaratory and injunctive relief under the Williams Act. Great Western is within the zone of interest sought to be protected by the rights it asserts.

B. *The "Injury in Fact" Test*

Great Western must also meet the second standing requirement by showing that it has a sufficient interest in the case for its dispute to qualify as a case or controversy. Put another way, Great Western must show that it actually suffers an injury due to defendants' acts challenged in this suit.

Great Western pled in its complaint that the various takeover statutes have a "chilling effect" upon the rights of tender offerors throughout the country. Yet the mere existence of defendants' takeover laws does not lend the degree of concreteness constitutionally required of a case or controversy. It is incumbent upon Great Western to show indication of the intentions of Idaho, New York and Maryland to enforce these statutes to its detriment.[5] Through overtures to the three defendants before the institution of

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[5] *See, e. g. California v. LaRue*, 409 U.S. 109, 112, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (the litigants stipulated that the California Department of Alcoholic Beverage Control intended to take disciplinary action against appellee liquor licensees who offer sexual live entertainment in violation of state rules). The injury to one seeking a declaratory judgment against an allegedly unconstitutional state statute need not necessarily stem from the threat of immediate enforcement or prosecution; a threat of future enforcement by the state may be sufficient if the state is coercing some present compliance under the statute. *Lake Carriers' Association v. MacMillan*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972) (Michigan did not threaten immediate enforcement of challenged water pollution statute but was forcing plaintiffs to build sewerage storage facilities by threat of future enforcement.)

this suit, Great Western evoked the threat of enforcement with varying degrees of success.

1. *Standing as to Idaho*

There is no question that a case or controversy exists vis-a-vis Idaho officials. Baptie's detailed letter of comment, pointing up many shortcomings of Great Western's application under the Idaho law, and McEldowney's order, asserting jurisdiction over the proposed tender offer under the Idaho law and enjoining the tender offer from proceeding, constitute clear acts of present enforcement of the challenged law. Idaho officials have coerced compliance with their state takeover act. Great Western has produced testimony of John S. Guest, an investment banker, that delays under all of these state acts inflict an economic cost on the tender offeror by tying up his capital and significantly jeopardize the success of an offer. Under these facts, in the case of Idaho, Great Western has shown a sufficiently concrete injury stemming from the enforcement of an allegedly unconstitutional state law.

2. *Standing as to New York*

The actions of the New York officials are more problematical. The court heard testimony at the hearing on jurisdiction and venue from Milton Strom, whose firm has represented Great Western in New York, and William S. Dugan, an attorney with the New York Attorney General's office. The court has additionally inspected the affidavit of Martin S. Weber, also with the New York Attorney General. The witnesses generally agreed that Strom's firm and in particular Robert Pririe, a member of the firm, initiated

contact with the New York Attorney General's office during the week of March 21, 1977, in regard to the proposed tender offer. Strom's firm submitted a memorandum and attempted to secure a ruling from the Attorney General that New York would not assert jurisdiction (over the proposed tender offer) under its takeover law.

On March 23, 1977, Dugan told Pririe that "we were leaning towards a finding of jurisdiction." Transcript of April 8, 1977, (hereafter Tr. 1) at 158. On March 24, 1977, Weber conversed with Strom. Weber's affidavit relates the content of his communication to Strom in the exact same terms: they "were leaning toward finding jurisdiction," although they were still investigating. Mr. Strom testified that "Weber said that his office either, I don't remember his exact language, but it had either concluded or believed there was jurisdiction . . ." Tr. 1 at 23. Dugan testified that as of the date of the April 8, 1977, hearing no official decision had been made by the New York Attorney General to assert jurisdiction. Tr. 1 at 167. Such an official decision would be implemented by seeking a court order enjoining the tender offer. Tr. 1 at 171. New York was then proceeding with its investigation. Tr. 1 at 179.

At the time of the first hearing, the court viewed this evidence as presenting a coherent picture: the New York Attorney General has taken a working position that it had jurisdiction over the tender offer, and it was proceeding in lawyerlike fashion to finish its investigation into the relevant facts and law. It seemed a reasonable inference that Great Western would be enjoined by New York if it attempted to go forward with its takeover. N.Y.Bus.Corp. Law § 1606(a) (1976). Moreover, Great Western would

have exposed itself to criminal penalties if its conduct in going forward (after being informed of probable jurisdiction by the New York Attorney General) were deemed willful. N.Y.Bus.Corp.Law § 1607(a).

Under these circumstances, the court did not believe that the threat of action by New York was imaginary or speculative. Its position as to its takeover law was sufficiently adverse to Great Western to constitute a case or controversy,[6] and it was not necessary for Great Western to invite civil or criminal penalties for violating the New York law. *See Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The court therefore found in its preliminary findings of fact and conclusions of law, entered April 21, 1977, that New York officials had arrived at the working position that they had jurisdiction over the proposed tender offer under the New York takeover law and that a case or controversy existed.

3. *Standing as to Maryland*

With regard to the third defendant, Maryland, the court concluded on April 21, 1977, that no case or controversy ever existed because Maryland's assertion of jurisdiction over this tender offer was purely speculative. Mr. Polovoy, the Maryland Commissioner of Securities, successfully resisted the blandishments of Great Western to take a posi-

[6]While the most convincing demonstration of concrete injury under a regulatory statute is the repetitive enforcement of sanctions, e. g., *Armour v. Ball,* 468 F.2d 76 (6th Cir. 1972), such a requirement in the context of tender offers would effectively remove the declaratory judgment as a remedy. The court views *Lake Carrier's Association v. Michigan, supra,* as indicative that a court may consider economic pressures upon a business, induced by the likelihood of future enforcement of sanctions, in judging the effectiveness in face of a statutory obligation.

tion on Maryland's jurisdiction over the proposed tender offer. He testified in his deposition that he was unable to make a determination of jurisdiction from the facts he presently knew, that he had no intention of calling a hearing to investigate further unless someone asked him to do so, and that no one had asked. Polovoy Deposition at 12-14. Although this indecision by Maryland may have caused Great Western some inconvenience and expense—e. g., the necessity for further research or investigation—the court did not believe that Great Western was realistically prevented from going forward vis-a-vis Maryland, especially since Maryland's enforcement procedures for its takeover statute are exclusively civil. Polovoy Deposition at 6. The court now repeats its conclusion that Maryland has not presently indicated an intention to enforce its statute and that Great Western does not yet suffer an adequate detriment to make a concrete case of controversy against the Maryland statute.

Great Western has proven it has a "case or controversy" with Idaho and New York and has standing to assert claims against these defendants.

III. Mootness

At the hearing of May 23, 1977, after its frustrated attempt to take an uncertified interlocutory appeal in this case, New York representatives introduced in court a no action letter dated May 20, 1977, informing Great Western of the New York Attorney General's determination that the assets of Sunshine were not substantial enough to trigger the New York takeover statute. Although no party to the suit expressed any desire to have the case dismissed against the New York officials, the court raised the issue

of mootness, which affects this court's subject matter jurisdiction. *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

The doctrine of mootness stems from Article III of the United States Constitution which enables courts to adjudicate "cases and controversies." Federal courts lack jurisdiction to decide questions that do not affect the rights of the litigants before them and are not empowered to decide moot or abstract questions. *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971); *U. S. v. Alaska S.S. Co.,* 253 U.S. 113, 40 S.Ct. 448, 64 L.Ed. 808 (1920).

New York desires to remain in the case to test on appeal its ardently held conviction that its officials may not be subjected to suit in another state on the basis of official actions. But New York's desire to vindicate itself on appeal is not sufficient to preserve a case or controversy.

Great Western has also insisted that the case is not moot as to New York. Although it is apparent that no relief against New York is necessary for Great Western to make its proposed tender offer, Great Western urges that the "voluntary cessation of allegedly illegal conduct does not . . . make the case moot." *United States v. W. T. Grant,* 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). *Grant,* however, was a *public* challenge to discontinued action. The Court was further satisfied that there existed "some cognizable danger of recurrent violation, something more than the mere possibility which keeps the case alive." *Id.* at 633, 73 S.Ct. at 898, 97 L.Ed. at 1309. As Professor Wright observes, however, a private plaintiff, such as

Great Western, must make a more particularized showing of future impact:

> Private plaintiffs challenging discontinued official or private action, however, must show more than the possibility of recurrence. In addition, there must be shown some level of probability that recurrence will affect the individual plaintiff . . . . Many state courts are willing to decide issues of public interest that are expected to recur, and to pose continuing difficulties of repeated mootness, without regard to the probable impact on the immediate plaintiff. The Supreme Court, however, has explicitly refused to apply this doctrine . . .

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3533 at 285. As Professor Wright also suggests, this requirement may be diluted when there is a future impact on interests which the plaintiff is in effect given standing to represent, i. e., public interest cases such as abortion and election suits. *Id.* at 289.

While the instant case may involve issues important to many investors and corporations, the court does not believe that it falls into the pattern of public interest cases about which Professor Wright is speaking. Great Western, as a private litigant, has not made the required showing that it will again be injured by enforcement of the New York law. Nor can Great Western accurately characterize the actions of the New York officials as "capable of repetition, yet avoiding review" so as to avoid the requirement of a projected future effect upon itself. It is true that the few hostile tender offerors in recent years affected by these state takeover laws have chosen to comply as a tactical matter. It is generally quicker to comply than to litigate, and time is of the essence in tender offers. However, with

the recent proliferation of state takeover laws,[7] it is reasonable expectation that more companies will come to the conclusion of Great Western that the possible conflicts and confusion of complying with multiple state takeover laws are intolerable. The court has no doubt that the New York law will be challenged in the future under appropriate circumstances. For these reasons, the court lacks jurisdiction to adjudicate the case against New York due to mootness and it should be dismissed.

IV. Subject Matter Jurisdiction

Great Western has sought subject matter jurisdiction on four bases: 28 U.S.C. § 1331 (general federal question), 28 U.S.C. § 1332 (diversity), 28 U.S.C. § 1337 (acts regulating commerce), and 15 U.S.C. §§ 78aa (The Securities Exchange Act of 1934). The parties have stipulated that the amount in controversy exceeds $10,000.

In the opinion of the court, subject matter jurisdiction exists under 28 U.S.C. §§ 1331[8] and 1332. The court is further of the opinion that a suit challenging state legislation as preempted by the Securities Exchange Act of 1934 arises under Acts of Congress regulating commerce. Jurisdiction also lies under 28 U.S.C. § 1337.

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[7] As recently as 1974, only five states had takeover laws: Minnesota, Nevada, Ohio, Virginia and Wisconsin. Today twenty-eight states have such laws.

[8] It has long been held that a suit "arises under" the Constitution if the petitioner's claim "will be sustained if the Constitution . . . [is] given one construction and will be defeated if [it is] given another."

Powell v. McCormack, 395 U.S. 486, 514, 89 S.Ct. 1944, 1960, 23 L.Ed.2d 491 (1969). The instant case turns on construction of Article I, § 8 (the Commerce Clause) and Article VI, cl. 2 (the Supremacy Clause) of the United States Constitution.

The Securities Exchange Act of 1934 § 27, 15 U.S.C. §§ 78aa [hereinafter 1934 Act] grants the federal courts "exclusive jurisdiction of the violations of this title or rules and regulations thereunder and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."

In the opinion of the court, a suit for declaratory judgment against a statute preempted by the Williams Act, which is codified under the 1934 Act at 15 U.S.C. §§ 78m (b)-(e), 78m(d)-(f), falls within the broad ambit of this jurisdictional language: "all suits in equity or actions at law." The general breadth of the subject matter jurisdiction, personal jurisdiction, and venue conferred by § 27 indicates a Congressional intent to facilitate the litigation of any claim arising under the 1934 Act in federal court. Jurisdiction of a cause of action claiming preemption of a state law by virtue of the 1934 Act is especially appropriate since § 28(a) of the Act, 15 U.S.C. § 78bb(a), specifically addresses preemption of state law.[9] This section creates an express "duty" on states and state officers to abstain from enforcement of state securities laws to the extent they are preempted. Therefore, Great Western has properly alleged subject matter jurisdiction under §§ 1331, 1332, 1337 and 27.

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[9] "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

V. Sovereign Immunity

Defendants contend they are immune from suit due to the doctrine of sovereign immunity. Sovereign immunity is based on the old common law concept that a sovereign cannot be sued without its consent. The Eleventh Amendment provides that a state is not suable in a federal court "by citizens of another state." Though hoary, the doctrine is still viable. *Edelman v. Jordan,* 415 U.S. 651, 678, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). However, in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the United States Supreme Court held that a citizen may sue a state official to enjoin operation of an allegedly unconstitutional state statute, a decision that opened the floodgates to constitutional litigation. Perhaps the Idaho defendant truly considers *Ex parte Young, supra,* "an anomaly in the law." Idaho Brief for Jurisdiction and Venue Hearing at 40. In the opinion of the court, *Ex parte Young* is one of the pillars of our post-Civil War federal system and is firmly ensconced in our jurisprudence. Its application to prospective relief against state officials such as is sought in this case is to date unquestioned. See *Edelman v. Jordan,* 415 U.S. at 664, 667-8, 94 S.Ct. 1347, 39 L.Ed. 662. Sovereign immunity is no bar to a suit seeking declaratory and injunctive relief against state officials to prevent their prospective enforcement of an allegedly unconstitutional state law.

VI. Personal Jurisdiction

The Court has subject matter jurisdiction over this case on four bases: 28 U.S.C. § 1331 (general federal question), 28 U.S.C. § 1332 (diversity), 28 U.S.C. § 1337 (acts affecting commerce) and Section 27 of the 1934 Act. The court must now examine each subject matter cause of action to determine whether personal jurisdiction exists against the State of Idaho.

A. *Diversity Jurisdiction*

In diversity cases brought under 28 U.S.C. § 1332 the federal court sits as a state court and state law of personal jurisdiction controls. *Arrowsmith v. United Press Intl.,* 320 F.2d 219 (2nd Cir. 1963). Texas art. 2031b, Tex.Rev.Civ. Stat., provides for personal jurisdiction over non-residents. The scope of personal jurisdiction exercised by the State of Texas is contiguous with maximum constitutional limits of jurisdiction. *Product Promotions v. Jacques Cousteau,* 495 F.2d 483, 491-2 (5th Cir. 1974); *Hoppenfeld v. Crook,* 498 S.W.2d 52, 56 (Tex.Civ.App.—Austin 1973, writ ref'd, n. r. e.). There are two tests used to determine if jurisdiction exists. In order for a nonresident to be amenable to suit pursuant to art. 2031b there must be, first, "minimum contact with [Texas] which results from an affirmative act of the defendant" and "it must be fair and reasonable to require the defendant to come into the state and defend the action." *Product Promotion v. Jacques Cousteau,* 495 F.2d at 494.

1. *The "Minimum Contacts" Test*

The state of Idaho clearly has "minimum" contacts with Texas. The Idaho takeover statute prohibits Great Western from making *any* tender offer until Idaho law has been complied with. Idaho Code § 30-1501 et seq. This proscription affects Texas shareholders who might wish to sell their shares of stock.

Idaho has urged strongly that almost any state legislative or regulatory action in the commercial sphere effects predictable consequences outside the state and that more contact should be required than this minimum contact. For example, enforcement of Idaho blue sky law, regulating the offer or sale of securities by a Texas corporation in Idaho, would certainly have an impact in Texas. If the corporation were for some reason unable to comply with Idaho blue sky requirements, its inability to raise capital might cause Texas residents to lose their jobs. If the Idaho legislature passed new and onerous pollution controls on facilities owned by a Texas corporation in Idaho, Texas shareholders would be adversely affected. Subjecting state officials to suit in another state on the basis of out-of-state ripple effects from traditional, internal activities would be disruptive of federal relations.

But the court sees a qualitative difference in activities which concern primarily the internal commercial affairs of Idaho and incidentally affect out-of-state interests and the type of affirmative regulation of commercial affairs of non-residents attempted by the takeover act in question, Idaho Code § 30-1506. The court knows of no real analogy to this type of extraterritorial interference.

The Idaho takeover laws are not an exercise of the state's power to regulate the internal affairs of a corporation whose legal existence is derived from state power.[10] Sunshine is a Washington corporation which has triggered

[10]For other arguments that tender offers do not affect existing intracorporate relationships and thus involve the internal affairs of a corporation, See Comment, Commerce Clause Limitations upon State Regulation of Tender Offers, 47 So.Cal.L.Rev. 1133, 1153-7 (1974).

the Idaho takeover law because its principal office is located in Idaho and it has substantial assets in Idaho. Idaho Code § 13-1501(6).

Nor are state takeover laws analogous to state blue sky laws which protect state residents from fraudulent acts committed within state borders. Idaho has not merely told Great Western that it may not make a tender offer within Idaho—it has ordered Great Western to refrain from soliciting publicly traded securities anywhere. Idaho representatives have justified this extraterritorial aspect of the Idaho takeover law as necessary to protect the relative position of Idaho shareholders vis-a-vis shareholders of other states.[11] TRO tr. at 26. It is as if, to expand upon a previous example, Idaho enjoined corporations somehow subject to its jurisdiction from offering securities in any state unless they first complied with Idaho blue sky registration requirements. Idaho of course would not want its citizens deprived of advantageous investment opportunities if such corporation were inclined to omit Idaho from their offerings because of onerous blue sky requirements.

2. *The "Fair and Reasonable" Test*

The second requirement for personal jurisdiction is that it be "fair and reasonable" to require Idaho to defend a suit in Texas.

The court does not consider it fair and reasonable to subject state officials to suit in another jurisdiction because of extraterritorial ripple effects resulting from internal state actions. However, it does not offend this court's sense

[11]If there were no Idaho shareholders of Sunshine, Idaho could still apply its takeover law out of paternal concern for the shareholders of sister states. TR. I at 225.

of fundamental fairness to made Idaho officials defend in whatever forum they attempt to affirmatively regulate commercial affairs of nonresidents, whether this extraterritorial regulation is valid or invalid. Personal jurisdiction exists against officials of the State of Idaho pursuant to art. 2031b insofar as Great Western's diversity cause of action.

B. *Federal Question Jurisdiction*

Sections 1332 and 1337 of Title 28 do not contain any provisions for maintenance of personal jurisdiction. Section 27 of the 1934 Act provides that an action "may be brought" in the district "wherein any act or transaction constituting the violation occurred" or in which "the defendant is found or is an inhabitant or transacts business." This language in Section 27 sounds more like a venue provision rather than one providing personal jurisdiction and has been so construed. *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F.Supp. 191 (E.D.Penn.1974). Thus none of the federal question causes of action contains statutes providing for personal jurisdiction. When suits are brought in federal court on a federally created right without such a provision general federal law and concepts of due process determine whether a defendant is subject to the court's jurisdiction. Wright & Miller, Federal Practice and Procedure: Civil § 1075 (1969).

There is some difference of opinion among jurists and legal writers as to what standards are to be applied to determine if personal jurisdiction exists. Historically, the concept of personal jurisdiction is founded on the antiquated concept of Anglo-American law that a sovereign may exercise personal jurisdiction within its territorial

limits. This principle has been recognized as to the United States itself in suits based on federally created rights. *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F.Supp. 191, 198-200 (E.D.Penn.1974). Some writers have opined that personal jurisdiction exists against defendants anywhere in the United States[12] on a federally created cause of action without the necessity of any demonstration of the "minimum contacts" articulated in *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny, which set forth limitations on the exercise of extraterritorial jurisdiction by states beyond their territorial limits. In contrast, on federally created causes of action no attempt is made to assert extraterritorial jurisdiction since federal jurisdiction exists in all states. *Stern v. Gobeloff*, 332 F.Supp. 909 (D.Md. 1971); *First Flight Co. v. National Carloading Co.*, 209 F.Supp. 730 (E.D.Tenn.1962).

Most writers, however, have assumed some limits upon federal personal jurisdiction. Some have adopted *International Shoe* criteria, while others have held that the Fifth Amendment due process clause imposes constitutional limits. In *Oxford First Corp. v. PNL* [sic.] *Liquidating Corp.*, 372 F.Supp. at 203 (E.D.Penn.1974), the court applied a five-prong federal "fairness" test, of which one consideration was the *International Shoe* "contacts."[13]

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[12]Safeguards exist other than limits on personal jurisdiction. Once jurisdiction is found venue and service of process provisions must also be met to submit a defendant to jurisdiction in a district.

[13]The court also considered matters which would be considered under 28 U.S.C. § 1404, such as inconvenience to the defendant in the forum, the matter of judicial economy, the site of discovery and the extent of impact of the regulated activity in question that the defendant's actions have beyond its borders.

This court is of the opinion that the Fifth Amendment places some fairness limitations upon the power of the United States to require a defendant found within the territorial limits of the United States to be tried in some areas of the country. However, the court holds that the assertion of personal jurisdiction over the Idaho defendants pursuant to §§ 1331, 1337 and 27 does not impose any undue hardship upon the defendants or violate any fairness constraints on the federal judicial power under the circumstances of this case. These defendants have, to advance the interests of Idaho citizens and/or Sunshine, a corporation with Idaho ties, enjoined Great Western, a Texas based corporation, from purchasing shares of Sunshine from citizens of every state, including at least 489 Texas residents. Idaho officials give their takeover statute this extraterritorial effect by forbidding tender offerors subject to their jurisdiction from making any offer to citizens of antother state which is not also made to citizens of Idaho. Idaho Code § 30-1506.

The court is not impressed with the Idaho defendants' legalistic suggestion that as state officials they can only enforce their takeover laws through personal jurisdiction over Great Western within their territorial borders, that thus they have no presence outside their borders, and that it is therefore unfair to make them defend in Texas. TRO tr. 44, 116. The practical effect of the Idaho defendants' actions is to regulate business activities of Great Western and the investment opportunities of shareholders of Sun-

shine in Texas and every other state.[14] The court does not therefore find it unfair to make the Idaho defendants appear where the predictable consequences of their purposeful actions are felt. Personal jurisdiction exists against the Idaho defendants on the causes of action brought under Sections 1331, 1337 and 27.

VII. Venue

It has been determined that personal jurisdiction exists against the Idaho defendants. The next inquiry is whether venue is proper in this district.

A. *Venue of Federal Question Cases*

Section 1391(b) of Title 28, United States Code, provides that a civil action in which jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district "where all defendants reside, or in which the claim arose, except as otherwise provided by law." Sections 1331, 1332 and 1337 of Title 28 do not contain venue provisions and causes of action based on these sections may only be brought in the Northern District of Texas if venue lies under one of the two venue provisions contained in § 1391(b).

The Idaho defendants clearly do not "reside" within the Northern District of Texas and venue cannot rest on the

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[14] Although, as Idaho itself suggested at trial on the merits, its extraterritorial regulation may be void, its state officials have previously taken the contrary position. TRO tr. at 116. No prudent businessman is going to make the offer outside of Idaho and await the state's view on whether he should spend up to three years in prison. Idaho Code § 30-1510.

residence of defendants. Nor did the claim arise in this district. A claim is deemed to arise only in one place for § 1391 venue purposes. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3806 at 28-29 (1976). In determining where a claim arises, courts should use a weight of contacts test and determine the district where the contacts are most significant. *Grappone, Inc. v. Subaru of America, Inc.*, 403 F.Supp. 123 (D.C.N.H.1975); *Ghazoul v. International Management Services, Inc.*, 398 F.Supp. 307 (D.C.N.Y.1975).

It can be argued that the Idaho defendants injured Great Western in the Northern District of Texas, but any such argument applies equally to all other federal judicial districts. It is clear that Great Western's claim arises in Idaho, the source of the power extraterritorially asserted.

Therefore, venue in this district does not lie on Great Western's causes of action based on §§ 1331, 1332 and 1337.

B. *Venue Under the 1934 Act*

Unlike §§ 1331, 1332 and 1337, § 27 of the 1934 Act contains a venue provision and allows an action thereunder to be brought "in any district . . . wherein any act or transaction constituting the violation occurred or in the district wherein the defendant . . . transacts business . . ." The 1934 Act is intended as a broad, remedial statute and the plain intent of Congress was to provide the most potent venue provisions possible.

The acts giving rise to violation of Idaho's alleged preempted takeover statute occur wherever the statute is being enforced, i. e. all states in which Sunshine shareholders reside. If this result seems remarkable it is because Idaho's regulation of securities transactions outside its borders is equally remarkable. By enforcing this statute against Great Western and Texas shareholders of Sunshine, the Idaho defendants have committed acts in Texas which constitute an integral part of their allegedly unconstitutional enforcement of the Idaho takeover law. See *British Amer. Ins. Co., Ltd. v. Lee*, 403 F.Supp. 31, 33-34 (D.Del. 1975). The control exerted by the Idaho defendants in Texas is an economic and legal reality unfettered by any theoretical territorial limits upon Idaho's jurisdiction.

Venue lies in this district against the Idaho defendants on the cause of action based on § 27 of the 1934 Act. Pendent in personam jurisdiction and venue exist to consider Great Western's claim that enforcement of the Idaho takeover statute unconstitutionally burdens commerce. *Oxford First Corp. v. PNL* [sic.] *Liquidating Corp.*, 372 F.Supp. 191, 196 n. 15 (E.D.Penn.1974).

VIII. Service of Process

Rule 4 of the Federal Rules of Civil Procedure governs process in federal courts. Rule 4(d) governs service of process on defendants within the state in which the federal district court is located, while Rule 4(e) governs service on a defendant outside that state. Rule 4(e) provides the only means of accomplishing service on the Idaho defendants.

Rule 4(e) provides "whenever a statute of the United States . . . provides for service of a summons . . . upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the man-

ner prescribed by the statute, rule or order." Section 27 of the 1934 Act provides for worldwide service of process "wherever the defendant may be found." Service is proper on the Idaho officials within that statute.

The Texas Long Arm Statute, art. 2031b, Tex.Rev.Civ. Stat., provides an alternate method of service. It may, of course, be used in cases exclusively within federal question jurisdiction, as well as within diversity jurisdiction. Wright & Miller, Federal Practice and Procedure: Civil § 1075 at 313 (1969). Utilization of art. 2031b carries with it any Texas limitation on personal jurisdiction since Rule 4(e) allows service pursuant to a statute "under the circumstances" allowed by the statute. Service under art. 2031b incorporates Texas standards of amenability to suit which, as discussed above, render the Idaho defendants liable to suit herein. Service of process is also proper under the Texas Long Arm Statute.

Having found that jurisdiction, venue and service of process are proper against Idaho defendants the Court has at last charted its way to the merits of this action. Great Western challenges the validity of the Idaho takeover statute on two grounds. First, Great Western claims that Congress has preempted the Idaho takeover statute pursuant to the Supremacy Clause, Article VI, Clause 2 of the United States Constitution; and second, Great Western claims that the Idaho takeover statute violates the Commerce Clause, Article 1, Section 8, of the United States Constitution.

IX. Doctrine of Preemption

Article VI, Clause 2 of the United States Constitution provides in relevant part:

> "This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land."

In order to effect the Supremacy Clause, the courts have developed the doctrine of federal preemption. The doctrine renders state laws invalid if their effect is to create an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[15]

An analysis of preemption decisions leads this court to the conclusion that this area is imbued with result-oriented decisions which tend to comport with the philosophical leanings of the Supreme Court. This court discerns several tests which have been applied for the Supreme Court to determine whether a state statute is preempted by a federal statute. Applicability of any one of these tests will render the Idaho takeover statute preempted by the Williams Act.

First, a state statute is preempted if it is apparent from federal statutes, their legislative histories, or the pervasiveness of the federal regulatory scheme that Congress intended to occupy the field and displace state regulations. Second, a state statute is preempted if it affects a field in which the federal interest is so dominant as to preclude state laws regulating the same subject. Finally, a state statute is preempted if it conflicts with the federal law to

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[15] *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

such an extent as to be an obstacle to the accomplishment of the federal scheme.

A. *Congressional Occupation of the Field*

Congressional intent to fully occupy a field may be expressly stated or may be circumstantially inferred. In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1946), Justice Douglas listed various inferential approaches to Congressional occupation of a field:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose. . . .

Despite the many persuasive arguments about the pervasiveness of federal securities regulation, the need for national uniformity in this area, and the dominant federal interest therein, one impassable obstacle looms across this road to preemption. Great Western states in its brief: "For over forty years Congress has occupied the field of regulation of the securities markets." Plaintiff's Supplemental Memorandum (5/20/77) at 25. For this same period of time federal securities laws have coexisted with state securities laws.[16] Such coexistence would be impossible if

[16] "Of course, under securities laws state regulation may coexist with that offered under the federal securities laws." *SEC v. National Securities*, 393 U.S. 453, 461, 89 S.Ct. 564, 569, 21 L.Ed.2d 668 (1969).

Congress has occupied the field. Great Western can analogize to areas in which Congress has occupied the field, e. g., aviation, but it can point to no precedents consistently driving the states out of the field of securities regulation such as exist in the area of aviation. There is no way around the fact that state and federal securities laws presently coexist to some extent. The Williams Act does not occupy the field of tender offer legislation.

B. *Dominance of Federal Interest*

Nor is the federal interest in the securities market so dominant as to preempt state securities legislation. Federal control of the securities field is not "intensive and exclusive" as is federal control over aviation. States have a valid interest in regulation of securities sold within their borders and state statutes have existed regulating this area for some time. The dominance of the federal interest in securities does not preempt state statutes.

C. *Conflict Between the State and Federal Schemes*

A state statute may also be preempted by a federal law if it is in conflict with the federal law. A brief history of the Williams Act is helpful in this regard.

Congress did not concern itself with the federal regulation of cash tender offers until the 1960s, when the use of the cash tender offer had become popular due to its advantages over use of full-blown proxy contests. In 1965, Senator Harrison Williams introduced the first legislative proposals for regulation of tender offers. Senator Williams' first bill would have required any person making an offer to file certain information with the target company and with the Securities and Exchange Commission (SEC) twenty days in advance of the offer to shareholders. This

approach was criticized by the SEC and Senator Williams subsequently introduced a bill following the SEC's recommendation that a confidential statement be filed with the SEC five days before the offer was made to shareholders. This version of the bill met objection from members of Congress and the New York and American Stock Exchanges.

As enacted in 1968, the Williams Act contained no requirement whatsoever that an offeror make disclosure to a government agency in advance of the offer to shareholders. The Act requires disclosure of a minimal amount of information which would generally be necessary for an investor to make a reasonable decision whether to tender his shares, including the identity of persons on whose behalf purchases are to be effected, the source and amount of funds of the offeror, any plans of the offeror to liquidate, sell or merge the target company, the number of shares owned by the offeror and any contracts between the offeror and the target company. 15 U.S.C. § 78m(d)(1).

The legislative history of the bill makes it clear that the Williams Act was not designed to obstruct legitimate takeover bids, but to "balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids." 113 Cong.Rec. 854 (1967). After the Williams Act was passed, many states began enacting statutes regulating the making of tender offers of target companies having nexus in their states. The state takeover statutes base their jurisdiction on one of several connections with the State. The Idaho statute under consideration purports to regulate the tender of stock of any target company which

is an Idaho corporation, has its principal office in Idaho or has "substantial assets" located in Idaho. Idaho Code § 30-1501(6).

Substantively, the Idaho statute differs significantly from the requirements of the Williams Act. First, while the Idaho statute requires the offeror to provide information required by the Williams Act, it also requires other more detailed information. Some of the information, such as a description of business done by the offeror and material changes therein in the prior three years, seems only collaterally related to that information that a shareholder would require in deciding whether or not to tender his stock.

Second, while the Williams Act has no waiting period after filing the applicable information before an offer may be made, the Idaho act requires that a registration statement be declared effective by the Director of the Department of Finance before the offer can commence. Further, the management of the target company can demand a hearing which the State of Idaho is required to provide within twenty (20) days after the date of filing. A decision must be made within thirty (30) days after the hearing, but this time period may be extended. If a hearing is called the offer shall not become effective until registered by order of the Director of the Department of Finance. Idaho Code § 30-1504. Thus the management of the target company can unquestionably delay the institution of a tender offer for several weeks in which to marshal its resources.

Third, while the Williams Act requires the offeror to file the required information with the SEC under all cir-

cumstances, the Idaho Act does not require compliance with Idaho law if the target company's board of directors recommends acceptance of the tender to its shareholders. Idaho Code § 30-1501(5)(e).

It is clear that the Idaho statute conflicts with and frustrates the clear purposes of the Williams Act. The State of Idaho strongly maintains that a conflict exists rendering preemption applicable only if the state statute renders it impossible to comply with the federal standards. But a conflict may also exist when the state statute frustrates a Congressional purpose. Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Fordham L.Rev. 1, 23 (1976). The court is of the opinion that absolute impossibility of compliance with both laws is not necessary to a finding of preemption. Indeed, in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 145, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), the converse is indicated: If impossibility of compliance does not exist, then further inquiry is necessary.

This court is of the opinion that the Idaho statute conflicts with the Williams Act by destroying the careful balance struck in the Williams Act between the offeror and the management of the target company designed to protect the interests of the shareholders. It is clear from examination of the legislative history and the Act itself that Congress' purpose in enacting the Williams Act was to let tender offers go forward for the benefit of shareholders. It is equally clear that the purpose of the Idaho takeover statute is to inhibit tender offers for the benefit

of management.[17] This purpose is evident from several provisions of the Idaho statute discussed above. By providing that a hearing must be held for the protection of the Idaho shareholders if "requested by the target company acting through its Board of Directors," the Idaho statute gives management an absolute right to an administrative hearing prior to the time any tender may be made. If Idaho had the public interest in mind, any advance administrative review would be vested in a state agency which could hold hearings when necessary. The Idaho statute supplies management of the target company with a delay mechanism for use at its discretion. In contrast, the Williams Act provides for no administrative review prior to the time a tender is made.

Further, the Idaho statute provides for an exemption from compliance with the terms of the Idaho statute if the Board of Directors of the target company recommends its acceptance to the stockholders. In contrast, the Williams Act requires compliance with its terms in the case of all tender offers, thus indicating its interest in protection of the shareholders rather than the management.

The Idaho statute thus places the tools of delay—anathema to an offeror—within and only within the reach of management. And the statute blithely removes all impediments of an offer if management approves. There is a conflict of purpose between the Williams Act and the Idaho statute: the William Act regulates the making of tender offers for the benefit of shareholders, while the

[17]Courts may examine unstated purposes of state statutes when evaluating their validity. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 144-45, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 10, 49 S.Ct. 1, 73 L.Ed. 147 (1928).

Idaho statute regulates the making of tender offers primarily for the benefit of management of the target company. By weighing the scales so heavily in favor of management of target companies, the Idaho statute has destroyed the delicate balance reached by the Williams Act. Because of the conflict that exists, this court is of the opinion that the Idaho takeover statute is preempted by the Williams Act.

X. The Commerce Clause

Article I, Section 8 of the United States Constitution gives Congress the power "to regulate Commerce . . . among the several states" in order to prevent unjustifiable local restraints from interference with commercial intercourse among the states. Not every state statute regulating commerce is unconstitutional, of course. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), the Supreme Court stated the criteria for determining whether or not a state statute regulating commerce was constitutional:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

In order to be valid, a state statute regulating commerce must, first, effectuate a legitimate local public interest; second, affect interstate commerce only incidentally and; third, if the first two tests are met, meet a balancing test applied to determine whether or not the burden imposed on commerce is excessive in relationship to the alleged local benefits provided by the statute.

A. *Legitimate Local Interest*

A state statute regulating interstate commerce must first achieve a legitimate local public interest. An examination of the Idaho statute compels this Court to the conclusion that it is neither legitimate nor local in its application.

The primary purpose generally articulated for passage of state takeover laws has been the protection of shareholders of corporations which are incorporated in or have significant connections with the controlling state. In determining whether a state statute effects its articulated purpose a court examines the practical effects of the legislation rather than any statement of purpose contained in the law itself or its legislative history. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10, 49 S.Ct. 1, 73 L.Ed. 147 (1928).

In any tender offer, there are at least three interested parties who have conflicting interests to some extent: the offeror, the shareholders and the management of the target company. The Williams Act seeks to protect the shareholders and to balance the competing interests of the other two parties. Despite the Idaho defendants' contention that the Idaho statute protects the interest of shareholders, this court finds that the immediate purpose of the statute is to protect incumbent management.

The presence of the Idaho statute might work to the detriment of shareholders in several ways. First, the statute enables management of an unwilling target company to delay and frustrate the making of the offer by invoking the administrative procedure of the takeover statute. Second, the presence of the statute might dissuade a po-

tential offeror from making an offer where it is faced with one or more onerous state takeover statutes.

Third, there was evidence presented that the presence of the statute might discourage an offeror from initially announcing its top offer. In some such cases the offeror holds the top offer back from shareholders and discloses it to target company management only in hopes of obtaining management's approval of the offer. By obtaining such approval the offeror negates the necessity of complying with the takeover statute. In those cases where a friendly arrangement cannot be consummated, the shareholders might never have an opportunity to consider and accept the higher offer made only to management. Fourth, the presence of the statute might induce the offeror to reduce its originally announced offer price where it encounters resistance resulting from management's utilizing delays permitted by the takeover statute. In such case shareholders could also be deprived of the opportunity to consider and accept the original and higher offer.

The ultimate purpose of the Idaho statute is to thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state may not legitimate its regulation of interstate commerce by asserting this type of interest. As stated by the Supreme Court in *Hood & Sons v. Du Mond,* 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949), a statute may not be enacted "solely for protection of local economic interests."

Nor does the Idaho statute have only local application. The terms of the statute apply not only to the corporations

incorporated under the statutes of Idaho, having their main office in Idaho or having "substantial assets in Idaho," they also affect shareholders domiciled outside the state. The Idaho statute provides that tender offers may not be made to non-Idaho shareholders without being made to Idaho shareholders also. Idaho Code § 30-1506. The Idaho statute thus undertakes to regulate the offeror's affairs not only within Idaho, but within all states in which the offeror might make a tender offer. This intended extraterritorial effect distinguishes the takeover statute from state Blue Sky laws, which clearly do not intend to govern regulation of securities outside state boundaries.

Idaho has shown no legitimate local interests in protection of shareholders in other states. In short, the Idaho defendants have not demonstrated that the state takeover statute regulates a legitimate local interest.

B. *Effect on Interstate Commerce*

The second of the *Pike* criteria inquires whether the burden of the local law affects interstate commerce incidentally or significantly. It is clear that the Idaho takeover law purposefully precludes Great Western's making a tender offer anywhere until the provisions of the Idaho statute have been met. The Idaho takeover statute has a substantial effect on interstate commerce.

C. *The Balancing Test: Interstate Burden v. State Benefit*

Having failed the first two *Pike* criteria, it is not necessary for the court to apply the balancing test. Assuming arguendo that it is necessary to do so the court makes the following findings.

The testimony at the trial of this case indicated that there may well be some benefits to shareholders by a waiting period prior to making of a tender offer. The evidence indicated that once an announcement of a tender is made, the value of shareholders' stock tends to rise. In some cases, the offeror must raise its tender price as the value of the shares rises due to the initial tender. In other cases the management of the target company might make a tender for shares of its stock also in excess of the market value. But the provisions of the Idaho statute do not guarantee these possible benefits to shareholders will actually take place. If management is satisfied with a tender offer, the Idaho statute never even comes into play to delay the offer. Thus any benefits that would be derived to the shareholders by the terms of the Idaho statute are by no means assured.

Weighed against this contingent benefit to shareholders is the burden that the Idaho statute places on interstate commerce. Evidence at trial showed that takeover statutes have a tendency to discourage offerors from making tender offers and that the very presence of state takeover statutes might eliminate the possibility of a tender offer being made. Further, compliance by an offeror with one state statute interferes with commerce; compliance with many state statutes (as in a tender for a large target company) would unquestionably have a deleterious effect on interstate commerce.

Even after compliance with the takeover statutes, their provisions would have several other effects on interstate commerce. First, evidence showed that the takeover statutes encourage offerors to make lower offers than would have

been made without the statute. Second, the waiting and announcement period of the Idaho statute might well have a disruptive effect on the stock of the target company, perhaps to the extent that there would be little market for the stock while the waiting periods were complied with. Finally, the waiting periods would permit management of a target company to delay the tender offer for varying periods during which time they could merge with another company, appeal to the shareholders not to sell their shares, make long term management contracts with target company personnel, or attempt to purchase the shares themselves. The Idaho statute violates the Commerce Clause and the Idaho defendants should be enjoined from enforcing the statute.

XI. Conclusion

The legislative history and contents of the Williams Act lead this Court to conclude that Congress intended to regulate the making of cash tender offers. The Idaho takeover statute, Idaho Code §§ 30-1501 to 1513 (Supp. 1975), effectively destroys the Congressional plan for the making of such tender offers and is therefore preempted by the Williams Act. Further, the Idaho takeover statute does not fulfill a legitimate local interest but, to the contrary, has a pervasive effect on interstate commerce that violates the Commerce Clause of the United States Constitution. The relief sought by Great Western for a declaratory judgment and injunctive relief against the Idaho defendants should be granted.

The parties will submit a Judgment in accordance with this Opinion.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Civil No. 77-2809

[Filed October 23, 1978]

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho,
Defendant,

Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,
Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho, defend-

ants above named, hereby appeal to the Supreme Court of the United States from the decision of the above entitled Court entered on the 10th day of August 1978 affirming the Memorandum Decision of the United States District Court for the Northern District of Texas, Dallas Division, entered on the 2d day of September 1977.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated this 20th day of October, 1978.

/s/ Peter E. Heiser, Jr.
Special Deputy Attorney General
Counsel for Said Defendants

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 20th day of October 1978, I served a true and correct copy of the above and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon:

Ivan Irwin, Esq.
Al B. Conant, Jr., Esq.
Shank, Irwin, Conant, Williamson & Grevelle
2827 First National Bank Building
Dallas, Texas 75202
Attorneys for Plaintiff-Appellee

by placing a copy thereof in the United States Mail, first class postage prepaid, in a sealed envelope addressed to said individuals at the above address, which is the last address of said individuals known to me.

/s/ Peter E. Heiser, Jr.

Wayne L. Kidwell
Attorney General, State of Idaho
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 384-2400

Peter E. Heiser, Jr.
4060, 212th Way S.E.
Issaquah, Washington 98027
Tel: (206) 392-3439
Special Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

Civil Action

No. CA3-77-0405-D

Great Western United Corporation,
Plaintiff,

vs.

Wayne L. Kidwell, Attorney General of Idaho, et al.,
Defendants.

[Filed October 24, 1978]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho, defendants above named, hereby appeal to the Supreme Court of the United States from the Memorandum Decision of

the above entitled court entered on the 2d day of September 1977 as affirmed by the United States Court of Appeals for the Fifth Circuit on the 10th day of August 1978.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated this 20th day of October 1978.

/s/ Peter E. Heiser, Jr.
Special Deputy Attorney General
Counsel for Said Defendants

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 20th day of October 1978, I served a true and correct copy of the above and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon:

Ivan Irwin, Esq.
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Shank, Irwin, Conant, Williamson & Grevelle
2827 First National Bank Building
Dallas, Texas 75202
Attorneys for Plaintiff

by placing a copy thereof in the United States Mail, first class postage prepaid, in a sealed envelope addressed to said individuals at the above address, which is the last address of said individuals known to me.

/s/ Peter E. Heiser, Jr.

15 U.S.C. § 78m(d, e) (1970)

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds

is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as

necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such addition information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which

the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

15 U.S.C. § 78n(d-f) (1970)

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time

copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be

pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any ma-

terial fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Idaho Code §§ 30-1501 to 30-1513

CHAPTER 15

Corporate Take-Overs

30-1501. Definitions.—When used in this chapter, unless the context otherwise requires:

(1) "Director" means the director of the department of finance.

(2) "Equity security" means any shares of stock or similar securities, or any securities convertible into such securities, or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of investors, is deemed an equity security pursuant to rule of the director.

(3) "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates and associates of that person, and all persons acting jointly or in concert for the purpose of acquiring, holding or disposing of or exercising any voting rights attached to the equity securities for which a take-over offer is made. "Offeror" does not include any bank or broker-dealer loaning funds to an offeror in the ordinary course of its business, or any bank, broker-dealer, attorney, accountant, consultant, employee, or other person furnishing information or advice to or performing ministerial duties for an offeror, and not otherwise participating in the take-over offer.

(4) "Offeree" means the beneficial owner of equity securities which an offeror acquires or offers to acquire in connection with a take-over offer.

(5) "Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror would be directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer. "Take-over offer" does not include an offer or acquisition of any equity security of a target company pursuant to:

(a) Brokers' transactions effected by or through a broker-dealer in the ordinary course of its business.

(b) An exchange offer for securities of another issuer, if the offer is exempted from registration or is registered under chapter 14, title 30, Idaho Code, and does not involve any public offering under the Securities Act of 1933.

(c) An offer made to not more than ten (10) persons in this state during any period of twelve (12) consecutive months.

(d) An offer made to all the stockholders of the target company, if the number of its stockholders does not exceed one hundred (100) at the time of the offer.

(e) An offer as to which the target company, acting through its board of directors, recommends acceptance to its stockholders, if the offer is made to all stockholders on substantially equal terms.

(f) An offer if the acquisition of any equity security pursuant thereto, together with all other

acquisitions by the offeror of securities of the same class during the preceding twelve (12) months, would not exceed two per cent (2%) of that class of the outstanding equity securities of the issuer.

(g) An offer by the target company to acquire its own equity securities.

(6) "Target company" means a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in this state, which has substantial assets located in this state, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a take-over offer relating to any class of its equity securities. [I.C., § 30-1501, as added by 1975, ch. 248, § 1, p. 662.]

30-1502. Filing of ownership information.—(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a target company, is directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer shall, within ten (10) days after such acquisition, file with the director on a form prescribed by him a statement containing the following information and such additional information as the director by rule prescribes:

(a) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected.

(b) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of the parties thereto.

(c) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation or make any other major change in its business, corporate structure, management or personnel.

(d) The number of shares or units of any equity security of the target company of which each such person and each associate of such person and each person included as an offeror is the beneficial owner or which each such person has a right to acquire, directly or indirectly, together with the name and address of each such person.

(e) Material information as to any contracts, arrangements or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with

whom such contracts, arrangements or understandings have been entered into.

(2) If the target company is an issuer the acquisition of whose equity securities is subject to the requirements of section 13(d) of the Securities Exchange Act of 1934, any person may file with the director a signed copy of the statement prescribed therein in lieu of the statement prescribed in section 30-1502(1), Idaho Code.

(3) Any person may file with the director, in lieu of the statement prescribed in section 30-1502(1), Idaho Code, and unless otherwise ordered by the director, a statement containing his name and address, the number of shares or units of any equity security of the target company which are beneficially owned directly or indirectly by him and each of his associates, the date of their acquisition and such other information as the director may by rule prescribe, if he certifies that such securities were acquired by him, in the ordinary course of his business and not for the purpose or having the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect, and that he does not intend to make a take-over offer involving the target company.

(4) If any material change occurs in the facts set forth in the statement, the person filing the statement shall, within ten (10) days thereafter, file with the director an amendment describing the change, in accordance with such rules as the director prescribes.

(5) Each person required to file any statement or amendment thereto with the director under this section

shall send a signed copy of such statement or amendment by certified mail to the target company at it principal office not later than the date of filing.

(6) No person required to file any ownership statement under this section, who is delinquent in the filing of such statement, may file a registration statement relating to a proposed take-over for a period of sixty (60) days after the date of filing of the ownership statement, except as may be permitted by order of the director. [I.C., § 30-1502, as added by 1975, ch. 248, § 1, p. 662.]

30-1503. Registration of take-over offers.—(1) It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director. Before a take-over offer becomes effective under this chapter, the offeror shall file with the director a registration statement containing the information prescribed in section 30-1503(2), Idaho Code, and send a copy of the registration statement by certified mail to the target company at its principal office and publicly disclose the material terms of the proposed offer, not later than the date of filing of the registration statement.

(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(a) All of the information specified in section 30-1502(1), Idaho Code, any part of which may be incorporated by reference to the extent that it was previously filed.

(b) Three (3) copies of the proposed take-over offer, including all material terms thereof, in the form proposed to be published or sent or delivered to security holders of the target company.

(c) Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period.

(d) Material information concerning the identity and background of any offeror who is not a corporation, including his material business activities and affiliations during the past three (3) years, and a description of any material pending legal or administrative proceedings in which the offeror is a party.

(3) The director may require the offeror to file any other documents, exhibits and information that he deems material to the take-over offer, and he may permit the omission of any of the information specified in section 30-1503(2), Idaho Code, if he determines that such information is not required for the protection of offerees. The director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), Idaho Code, or does not provide full disclosure to offerees of all material information concerning the offer.

(4) A take-over offer becomes effective when approved by the director. The director may call a hearing if he deems it necessary or appropriate for the protection of offerees in this state, and shall call a hearing if so requested by the target company, acting through its board of directors. If a hearing is called, the offer shall not become effective until registered by order of the director.

(5) Any hearing called by the director under this section shall be held within twenty (20) days of the date of filing of the registration statement under section 30-1503(1), Idaho Code, and any determination made following the hearing shall be made within thirty (30) days after such filing, unless extended by order of the director for the convenience of the parties or for the protection of offerees in this state. If, the following the hearing, the director finds that the take-over offer fails to provide for full disclosure to offerees of all material information concerning the offer, or will not be made to all stockholders on substantially equal terms or is in violation of chapter 14, title 30, Idaho

Code, he shall by order deny registration of the offer. Registration of the offer is not deemed approval of the offer by the director. [I.C., § 30-1503, as added by 1975, ch. 248, § 1, p. 662.]

30-1504. Filing of solicitation materials.—(1) Copies of all advertisements, circulars, letters or other materials published by the offeror or the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the director and sent to the target company or offeror, respectively, not later than the time copies of such solicitation materials are first published or used or sent to security holders of the target company.

(2) Solicitation materials used in connection with a take-over offer shall not contain any false statement of a material fact or omit to state a material fact necessary to make the statement therein not misleading. The director may by rule or order prohibit the use of any solicitation materials deemed false or misleading. [I.C., § 30-1504, as added by 1975, ch. 248, § 1, p. 662.]

30-1505. Fraudulent and deceptive practices.—It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation:

(1) Publication or use in connection with the offer of any false statement of a material fact or omitting to state a material fact necessary to make the state-

ments made by him not misleading, but not including the mailing by a target company to its stockholders of solicitation materials published by an offeror.

(2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer.

(3) Refusal by a target company to permit an offeror who is a stockholder of record to examine its list of stockholders, and to make extracts therefrom, pursuant to the applicable corporation statute, for the purpose of making a take-over offer in compliance with this chapter.

(4) Acquisition by or through a broker-dealer acting on behalf of an offeror of any equity security of the target company in connection with a take-over offer unless the broker-dealer files with the director such information as he requires and to the extent permitted by rule or order by the director, or unless the broker-dealer did not know and in the exercise of reasonable care could not have known that the person for whom it acted was an offeror or that the acquisition was in connection with a take-over offer. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1506. Limitations on offerors.—(1) No offeror may make a take-over offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders in this state on substantially the same terms as the offer is made to stockholders outside this state.

(2) An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a take-over offer may be withdrawn by or on behalf of any offeree at any time within seven (7) days from the date the offer has become effective under this chapter and after sixty (60) days from the date the offer has become effective under this chapter, except as the director may otherwise prescribe by rule or order for the protection of investors.

(3) If an offeror makes a take-over offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto within ten (10) days after the offer has become effective under this chapter and copies of the offer, or notice of any increase in the consideration offered, are first published or sent or given to security holders is greater than the number the offeror has offered to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

(4) If an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to security holders, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer.

(5) No offeror may make a take-over offer involving a target company, or acquire any equity securities of a target company pursuant to the offer, at any time when an administrative or injunctive proceeding has been brought by the director against the offeror for violation of this chapter that has not been finally determined.

(6) No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company located in this state in connection with a take-over offer unless the take-over offer is effective or exempt under this chapter, except as permitted by order of the director. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1507. Administration, rules and orders.—(1) This chapter shall be administered by the director of the department of finance, who may exercise all powers granted to him under chapter 14, title 30, Idaho Code, which are not inconsistent with this chapter.

(2) The director may make rules necessary to carry out the purposes of this chapter, including, without limitation, the definition of terms used in this chapter.

(3) The director may by rule or order exempt from any provisions of this chapter take-over offers that he determines are not made for the purpose or do not have the effect of changing or influencing the control of a target company or where compliance with this chapter is not necessary for the protection of the stockholders of the target company, and he may similarly exempt any persons from the filing of statements under this chapter.

(4) The director may by order direct any person to file any statement provided for in this chapter if it appears that such person is required to file such statement and is delinquent in the filing of such statement. [I.C., § 30-1507, as added by 1975, ch. 248, § 1, p. 662.]

30-1508. Fees and expenses.—(1) For each registration statement filed by an offeror, the offeror shall pay a filing fee based upon the cost to the department of finance to

examine and evaluate the registration statement in accordance with schedules adopted by the director. The schedules adopted by the director shall be designed to assure that the fees collected shall be sufficient to cover the cost of administering this act.

(2) All of the expenses reasonably attributable to any hearing held under this chapter shall be charged ratably to the offeror and the target company but the total amount charged shall not exceed one thousand five hundred dollars ($1,500). [I.C., § 30-1508, as added by 1975, ch. 248, § 1, p. 662.]

30-1509. Injunctions.—Whenever it appears to the director that any person, including a controlling person of an offeror or target company, has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder, he may bring an action in the name of the state in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder, or he may refer the matter to the attorney general or the proper prosecuting attorney. Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order or may order rescission of any sales or purchases of securities determined to be unlawful under this chapter or any rule or order hereunder. The court may not require the director to post a bond. [I.C., § 30-1509, as added by 1975, ch. 248, § 1, p. 662.]

30-1510. Criminal penalties.—(1) Any person, including a controlling person of an offeror or target company, who wilfully violates this chapter or any rule under this chapter, or any order of which he has notice, may be fined not

more than five thousand dollars ($5,000) or imprisoned not more than three (3) years or both. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this chapter more than three (3) years after the alleged violation.

(2) The director may refer such evidence as is available concerning violations of this chapter or of any rule or order hereunder to the attorney general or the proper prosecuting attorney who may, with or without reference, institute the appropriate criminal proceedings under this chapter. If referred to a prosecuting attorney, he shall within ninety (90) days file with the director a statement concerning any action taken or, if no action has been taken, the reasons therefor.

(3) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute. [I.C., § 30-1510, as added by 1975, ch. 248, § 1, p. 662.]

30-1511. Civil liabilities.—(1) Any offeror who purchases a security in connection with a take-over offer not in compliance with this chapter or by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received, or for damages. Damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable.

(2) Every person who directly or indirectly controls a person liable under section 30-1511(1), Idaho Code, every partner, principal executive officer or director of such person, every person occupying a similar status or performing similar functions, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, is also liable jointly or severally with and to the same extent as such person, unless the person liable hereunder proves that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(3) No action may be maintained under this section unless commenced before the expiration of three (3) years after the act or transaction constituting the violation.

(4) The rights and remedies under this chapter are in addition to any other rights or remedies that may exist at law or in equity. [I.C., § 30-1511, as added by 1975, ch. 248, § 1, p. 662.]

30-1512. Application of chapter.—(1) If the target company is an insurance company subject to regulation by the director of the department of insurance, a banking corporation subject to regulation by the director of the department of finance, a savings and loan association subject to regulation by the director of the department of finance, or a public utility subject to regulation by the public utilities commission, the director shall promptly furnish a copy of the registration statement filed under this chapter to the regulatory agency having supervision of the target company. Any hearing under this chapter involving any such target company shall be held jointly with the regulatory agency having supervision, and any determination following the hearing shall be made jointly with that regulatory agency.

(2) If the target company is a public utility, public utility holding company, national banking association, bank holding company or savings and loan association subject to regulation by a federal agency and the take-over of such company is subject to approval by that agency, this chapter shall not apply.

(3) This chapter shall not apply to any offer involving a class vote by stockholders of the target company, pursuant to its articles of incorporation or the applicable corporation statute, on a merger, consolidation or sale of corporate assets in consideration of the issuance of securities of another corporation, or sale of its securities in exchange for cash or securities of another corporation. [I.C., § 30-1512, as added by 1975, ch. 248, § 1, p. 662.]

30-1513. Application of securities law.—All of the provisions of chapter 14, title 30, Idaho Code, which are not in conflict with this chapter shall apply to any take-over offer involving a target company. [I.C., § 30-1513, as added by 1975, ch. 248, § 1, p. 662.]

JOHN V. EVANS
Governor

(SEAL)
STATE OF IDAHO
Department of Finance
Boise 83720
Tom D. McEldowney
Director

March 25, 1977

Steven C. Metzger
2827 First National Bank Building
Dallas, Texas 75202

Re: Great Western United Corporation Offer to Purchase Shares of Common Stock of Sunshine Mining Company and the Registration of Such Offer Under Title 30, Chapter 15, Idaho Code and the Regulations Adopted Thereunder.

Dear Mr. Metzger:

During the afternoon of March 21, 1977, Mr. David J. Wagnon, Vice-President of Western Investment Company, a subsidiary of Great Western United Corporation and Mr. Robert L. Magnuson attorney of the law firm Witherspoon, Kelley, Davenport & Toole, Spokane, Washington, hand delivered an application for registration under the Idaho Corporate Take-Over Law on behalf of Great Western United Corporation to this office.

We have reviewed the application of registration and the proposed form of Offer to Purchase for compliance with the Idaho Code and appropriate regulations thereunder. We present the following comments:

(1) Pages six through ten are missing from schedule 13D which has been marked as exhibit 1A under the application for registration.

(2) We ask that schedule A of schedule 13D be incorporated in the proposed form of Offer to Purchase.

(3) We ask that page 1 of the proposed form of Offer to Purchase set-forth a table of contents listing Sections 1-15 and identifying each section by their appropriate page numbers. We also ask that Sections 12, 13, 14 and 15 be placed at the front of the proposed form of Offer to Purchase immediately following Section 3 and preceding Section 4 on page 8.

The following comments pertain to the disclosure made within the proposed Offer to Purchase.

On page 29 we ask that the nature of the litigation between Sunshine Mining Company and the Shareholders Committee be disclosed and that the status of Charles E. Schwab be indicated. Disclose what is meant by the statement, "The purchaser understands that the committee has been desolved."

The second paragraph of page 29 begins: "Representatives of the purchaser met with Mr. Schwab on February 10, 1977 and with representatives of both Hecla Mining Company and Silver Dollar Mining Company and Mr. Schwab on February 15, 1977 to ascertain whether the purchaser had an interest in purchasing the shares." Please disclose who arranged those meetings and what communications took place at those meetings.

The second paragraph of page 29 begins: "During the week of February 21, 1977 representatives of the purchaser

visited a mine in the Coeur d'Alene mining district operated by Hecla Mining Company which they were advised had operations generally comparable to those of the company." Please disclose who extended the invitation. Also identify the mine and who advised the representatives that the mine had operations generally comparable to that of Sunshine Company and upon what basis such advice was given.

The second sentence of page 30 states the representatives were also provided by Hecla Mining Company and Silver Dollar Mining Company with certain information and reports. Please disclose the names of the persons who provided such reports and identify the reports. Please furnish one copy of each report to the Department of Finance.

The third sentence of page 31 states, "Upon consummation of the Offer to Purchase, the purchaser intends to further investigate and evaluate the company's mining and other operations. Please disclose the extent of the purchaser's current evaluation and investigation of the company's mining and other operations and also disclose what further investigation and evaluation would be made upon the consummation of the offer.

The second sentence on page 38 states the purchaser believes that the offer will not be effective in the State of Idaho during any such hearing and that the purchaser would not be permitted to purchase or pay for any shares tendered by shareholders in Idaho during such period. This sentence implies that the purchaser would be allowed to make tenders outside the State of Idaho. Section 30-1503(1), *Idaho Code,* states in part: "It is unlawful for any person to make a take-over offer involving a target company in

this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the Director. It is our position that tenders made within and without of the State of Idaho would be unlawful unless the tender offer is effective or exempt under Chapter 15, Title 30 of the Idaho Code.

The provisions of paragraph 3 subpart d under caption *Registration of Take-Over Offers* as set-forth on pages 2 and 3 of the adopted Rules and Regulations under Title 30, Chapter 15, Idaho Code requires that information required of Items 1 through 9 of Form IDF-03-60-75 or an adequate summary thereof be disclosed in the proposed form of Offer to Purchase. We believe that disclosure required by Item 8 of Form IDF-03-60-75 which states: "Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, *a description of each class of its capital stock* and *long-term debt,* a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, *a description of the location and character of the principal properties of the offeror and its subsidiaries,* a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period is not adequately disclosed under Section 12 on page 39. Please amend this section to

include additional disclose concerning the items underlined [italicized] in item 8 above.

The last sentence of the first paragraph of page 40 states, "During the fiscal year ended May 31, 1975, the purchaser determined to dispose of "Great Western Cities", but no offers to purchase "Great Western Cities" are being considered at the present. Please disclose the reasons for deciding to dispose of "Great Western Cities".

The first sentence of the second paragraph on page 41 states, "The purchaser has filed with the Commission preliminary proxy material relating to a proposed plan of recapitalization. We ask that a more definitive description of the proposed plan be disclosed indicating any possible affect such plan might have with regard to the Sunshine Company.

We ask that the summary of litigation disclosed beginning on page 44 and ending on page 46, more accurately reflect the legal proceedings disclosed under item 5 in form 10K of Great Western United Corporation.

The second paragraph of page 47 states, "Approximately 33 million dollars required by the purchaser to purchase 2 million shares under the offer will be obtained under a 35 million dollar commitment to Western Investment from a bank from which it has borrowed in the past. You have asked in a separate letter that the identity of the bank be held confidential. We agree to meet this request, however, we ask that one copy of the commitment agreement be furnished to the Department under confidential letter.

The second paragraph on page 49 states, "The purchaser expects that it will not depend upon earnings of the company (except dividends at the current rate annually paid by the company) to repay any borrowings under the commitment and under other presently outstanding indebtness of the purchaser and its subsidiaries. The purchaser does not intend to utilize shares or assets of the company for such purpose." Please disclose how the purchaser expects to repay the borrowings under the commitment.

The last sentence on page 49 states, "The purchasers [sic.] objective in making the offer is to acquire working control of the company." Please define and disclose what is meant by working control of the company.

The second sentence on page 51 states, "Although the purchaser has not decided which additional individuals it might nominate, such nominees will include Messrs., N. B. Hunt, W. H. Hunt and G. Michael Boswell." Please disclose whether or not there are any informal or formal agreements with Hecla Mining Company, Silver Dollar Mining Company or members of the Sunshine Shareholders Committee which would agree to appoint such persons to the Board of Directors of the Sunshine Company on behalf of the purchaser.

The second sentence on page 53 states, "The purchaser believes a stockholder should not be subject to such risk of ordinary income treatment if all of the shares owned by him directly or indirectly were disposed of either pursuant to the offer or at any time prior to the effective date of any future merger or similar combination, etc." We ask that the wording, "subject to such risk" be eliminated from this sentence.

The second paragraph of page 53 states, "Under the laws of the State of Washington any merger, consolidation, liqui-

dation or sale of all or substantially all of the assets of the company would require the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote." Please disclose whether or not under Washington law the purchaser upon obtaining a majority representation of the Board of Directors could instruct such directors to authorize the issuance or sale of the company's authorized but unissued common stock, without the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote. Also describe the affect of such action upon the Sunshine Company if the purchaser decided to take such action.

The second paragraph on page 56 states that if the purchaser acquires control of the company, etc. Please disclose and indicate what is meant by the word "control" as used in that sentence. Also indicate what impact a merger or disposition of some or all of the company's subsidiary and divisions would have on the Sunshine Mining Company and those stockholders who, for whatever reason, do not tender their shares pursuant to this offer and whether or not assets or funds received would be used to repay monies obtained from the bank commitment for this tender offer either directly or indirectly.

The last sentence of the second paragraph on page 56 states, "The purchaser has advised Hecla Mining Company and Silver Dollar Mining Company that it would support reimbursement by the company of the expenses of Hecla Mining Company and Silver Dollar Mining Company in connection with the activities of the Shareholders Committee to maximum of $200,000." It is the Department's view that this reimbursement if made may constitute a violation under Section 30-1505(2), *Idaho Code,* which states in

part: "It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation: (2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer."

Please disclose whether or not the purchaser has or intends to enter into any working or financial agreements other than the March 18, 1977 stock purchase of 335,070 shares of stock in Sunshine Mining Company with Hecla Mining Company, Silver Dollar Mining Company or any member of the dissolved Sunshine Shareholders Committee.

Based upon the above comments and under the provisions of Section 30-1503(3), *Idaho Code,* the Director has summarily ordered a delay of the effective date of the registration and the proposed tender offer.

The Department takes the position that the registration statement filed March 21, 1977 is not complete, as not all of the material information is disclosed. The twenty days referred to in Section 30-1503(5), *Idaho Code,* begins to run from the time a complete registration statement within the meaning of Section 30-1503(2), *Idaho Code,* is received and filed. Therefore, this Department will regard the filing date of Great Western United Corporation registration to be the date upon which the amendments, as requested above,

are received and accepted as complete. The twenty day limit for hearing shall begin to run as of such date.

The Department is prepared to issue a permit granting effectiveness to this registration upon a determination that the requested amendments are complete, contain all of the requested information, and otherwise comply with Chapter 15, Title 30, Idaho Code and the regulations adopted thereunder.

Should Great Western United Corporation decide not to file the amendments as requested, the Director is prepared to call for a hearing on his own initiative, to determine whether or not the application filed on March 21, 1977 contains sufficient disclosure.

Sincerely,
/s/ MELVIN J. BAPTIE
Deputy Administrator-Securities

MJB/rm

In the Office of the Director of Finance,
State of Idaho

In the matter of

Great Western United Corporation's offer to purchase shares of common stock of Sunshine Mining Company

ORDER

WHEREAS, on the afternoon of March 21, 1977, GREAT WESTERN UNITED CORPORATION filed an application for registration under the Idaho Corporate Take-Over Law relating to an offer to purchase shares of common stock of Sunshine Mining Company; and

WHEREAS, Title 30, Chapter 15, *Idaho Code,* known as the Idaho Corporate Take-Over Law, governs the take-over offer filed by GREAT WESTERN UNITED CORPORATION; and

WHEREAS, the administration of the Idaho Corporate Take-Over Law has been placed with the Director, Department of Finance; and

WHEREAS, Section 30-1503(3), *Idaho Code,* provides that the director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), *Idaho Code,* or does not provide full disclosure to offerees of all material information concerning the offer; and

WHEREAS, the offering statement has been carefully considered and analyzed; and,

WHEREAS, certain material information has been found to be lacking in the registration statement and the proposed form of Offer to Purchase; and

WHEREAS, the material information not provided in connection with the said take-over offer is fully specified in the letter of comment dated March 25, 1977, given to GREAT WESTERN UNITED CORPORATION, and incorporated in this Order by reference.

NOW THEREFORE, IT IS HEREBY ORDERED THAT the effective date of the offer be delayed.

DONE AND DATED this 25th day of March, 1977.

/s/ Tom D. McEldowney
Director of Finance
State of Idaho

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1677

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Idaho Dept. of Finance,
Defendants-Appellants,

Louis J. Lefkowitz, Attorney General of New York, et al.,
Defendants.

[Filed Apr. 6, 1977]

Appeal from the United States District Court for the Northern District of Texas

Before COLEMAN, GODBOLD and CLARK, Circuit Judges.

BY THE COURT:

The order of the district court entered March 31, 1977, is stayed pending further proceedings in the district court.

The district court is directed to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits. This proceeding involves novel and difficult issues which have broad impact upon federalism. Therefore, should the district court determine that it has jurisdiction and venue, it should consider certification of this determination under 28 U.S.C. § 1292(b) before trial on the merits.

Motions for clarification and for rehearing are DENIED.

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

[SEAL] September 26, 1978

Division of Corporation Finance

Richard Goodyear, Esq.
Assistant General Counsel
Occidental Petroleum Corporation
10889 Wilshire Boulevard
Los Angeles, California 90024

SEC File No. 2-62407

Dear Mr. Goodyear:

We have the following comments with respect to the registration statement filed August 21, 1978 on Form S-7 on behalf of your company.

General

(1) It would appear inappropriate, in light of the proceedings in Ohio with respect to such states' takeover laws, to proceed with effectiveness of the registration statement until such time as the offer to Mead shareholders can be made. This, of course, would not necessarily preclude utilization of the information in the registration statement in connection with the solicitation of the Company's shareholders for approval of the acquisition. Please advise.

(2) Please note that the responsibility for adequate and accurate disclosures in the registration statement rests solely with the Company. In this regard, the Company should take no comfort from the fact that the staff has commented on the registration statement, and should also

understand that the staff may have further comments or recommendations after review of the material being submitted to the Commission in connection with the Ohio litigation. Please confirm this understanding by letter.

Sincerely,
/s/ HERBERT D. SCHELL
Herbert D. Schell
Branch Chief